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Supreme Court, U.S.
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In The
# Supreme Court of the United States

MCI SALES AND SERVICE, INC., et al.,

*Petitioners,*

v.

JAMES HINTON, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Texas**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. The National Traffic and Motor Vehicle Safety Act of 1966 ("Safety Act") directs the Secretary of Transportation to prescribe federal motor vehicle safety standards. 49 U.S.C. § 30111(a). Under authority of that Act, the National Highway Traffic Safety Administration ("NHTSA") promulgated FMVSS 205, a detailed safety standard authorizing at least two types of glazings for side windows in motor vehicles: tempered glass and laminated glass. *See* 49 C.F.R. § 571.205. The official comments regarding this standard state that "[o]ne safety glazing material may be superior for protection against one type of hazard, whereas another may be superior against another type. Since accident conditions are not standardized, no one safety glazing material can be shown to possess the maximum degree of safety under all conditions against all conceivable hazards." ANSI/SAE Z26.1–1996 § 2.2. A Texas jury found that a motorcoach using tempered glass was defectively designed, thus establishing a common-law rule that using laminated glass is a better, safer design for side windows in all situations. Does FMVSS 205 preempt this claim?

2. NHTSA also promulgated FMVSS 208, which since 1971 has required seatbelts on motorcoaches at the driver position only for buses weighing more than 10,000 pounds, like the motorcoach at issue here. 49 C.F.R. § 571.208, S4.4.1. NHTSA specifically studied and rejected proposals to require seatbelts at all passenger positions. A Texas jury found that a motorcoach without

## QUESTIONS PRESENTED – Continued

passenger seatbelts was defectively designed, thus establishing a common-law rule mandating the installation of seatbelts at all positions on motorcoaches. Does FMVSS 208 preempt this claim?

3. The Texas Supreme Court concluded that FMVSS 208 did not preempt a design-defect claim based on the absence of passenger seatbelts because there was not a "clear and manifest statement of intent to forbid all regulation in that area." Similarly, the court concluded that FMVSS 205 did not preempt a design-defect claim based on the use of tempered glass because "NHTSA did not state a positive desire to preserve the use of tempered glass in windows." Under this Court's decisions in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), and *Williamson v. Mazda Motor of America, Inc.*, 562 U.S. ___ (2011), are express statements of preemptive intent required before a court may find implied conflict preemption?

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## CORPORATE DISCLOSURE STATEMENT

There is no publicly held company owning 10% or more stock of either MCI Sales and Service, Inc. or Motor Coach Industries Mexico, S.A. de C.V.

The following are parent corporations of one or both Petitioners:

1. Motor Coach Holdings, LLC
2. New MCI Holdings, Inc.
3. MCII Holdings, Inc.
4. Motor Coach Industries International, Inc.
5. MCIL Holdings, Ltd.
6. Motor Coach Industries Limited

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## OPINIONS BELOW

The Texas Supreme Court's opinion is reported at 329 S.W.3d 475 (Tex. 2010). (App. 1) The majority and dissenting opinions of the Texas Court of Appeals for the Tenth District are reported at 272 S.W.3d 17 (Tex. App.—Waco 2008). (App. 77, 135) The 170th District Court of McLennan County, Texas, did not issue an opinion but signed a Final Judgment in favor of Respondents. (App. 140)

## STATEMENT OF JURISDICTION

The Texas Supreme Court rendered its judgment and issued an opinion on December 17, 2010. (App. 1, 75) This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the judgment rendered by the highest court of the State of Texas. Although the judgment remanded the case for further proceedings based on a nonfederal issue involving the interpretation of Texas's proportionate responsibility statute, it finally decided that Petitioners do not have a federal preemption defense, which is the only federal issue in the case and is separate from the merits of Respondents' claims. Review of that decision is necessary to vindicate the important federal policies of safety and uniformity embodied in the statute and regulations at issue. *See Belknap, Inc. v. Hale*, 463 U.S. 491, 497–98 n.5 (1983); *NAACP v. Claiborne Hardware Co.*, 458

U.S. 886, 907 n.42 (1982); *cf. Constr. Laborers v. Curry*, 371 U.S. 542, 548 (1963).

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves the Supremacy Clause of the United States Constitution and the National Traffic and Motor Vehicle Safety Act of 1966 ("Safety Act").

The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

The Safety Act includes an express preemption provision and a saving clause. Under the preemption provision, a state cannot issue a motor vehicle standard unless it is identical to the federal standard:

> When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if

> the standard is identical to the standard prescribed under this chapter.

49 U.S.C. § 30103(b)(1). The saving clause provides: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." *Id.* § 30103(e).

The pertinent portions of the relevant Federal Motor Vehicle Safety Standards are set forth in the Appendix, App. 211, 213.

## STATEMENT OF THE CASE

### A. Regulatory background.

This case involves state common-law claims arising out of a motorcoach accident. The Texas Supreme Court held that Federal Motor Vehicle Safety Standards ("FMVSS") 205 and 208, promulgated by the National Highway Traffic Safety Administration ("NHTSA") pursuant to the Safety Act, do not preempt Respondents' inconsistent state common-law claims. (App. 2)

FMVSS 205 "specifies requirements for glazing materials for use in motor vehicles and motor vehicle equipment." 49 C.F.R. § 571.205, S1. This standard fully incorporates by reference a national standard for glazing materials in motor vehicles approved by the American National Standards Institute. *Id.*, S3.2(a) (incorporating ANSI/SAE Z26.1–1996). FMVSS 205 gives motorcoach and automobile manufacturers

the choice to install laminated glass or tempered glass (among other options) in the side passenger windows. The ANSI standard explains why a choice of glazing materials is necessary:

> One safety glazing material may be superior for protection against one type of hazard, whereas another may be superior against another type. Since accident conditions are not standardized, no one type of safety glazing material can be shown to possess the maximum degree of safety under all conditions, against all conceivable hazards.

ANSI/SAE Z26.1–1996 § 2.2.

FMVSS 208 "specifies performance requirements for the protection of vehicle occupants in crashes." 49 C.F.R. § 571.208, S1. The standard requires motorcoach manufacturers to install seatbelts for the "driver only" and does not require seatbelts at passenger seating positions. *Id.*, S4.4.

## B. The accident and lawsuit.

The motorcoach in question was manufactured in 1995, imported into the United States, and sold by Petitioners (collectively "MCI") in 1996 to Central Texas Bus Lines, which owned and operated the motorcoach on the day of the accident. The accident occurred on February 14, 2003. Heavy rain and fog reduced visibility. The road was wet and hilly. The treads on the bus's rear tires were thin. The driver of the bus, not realizing soon enough that the traffic in

front of him was stopped, swerved, causing the motorcoach to cross the interstate's median and careen into an oncoming Suburban. The motorcoach tipped onto its side, slid, and came to rest on a grassy bank on the far side of the oncoming traffic. Some bus passengers were ejected. Five passengers died; fourteen were injured. The injured passengers and family members (collectively the "Hintons") sued MCI claiming, among other things, that the motorcoach was defectively designed because it lacked passenger seatbelts and laminated glass in the side passenger windows.

Before trial, MCI asserted preemption as a defense and moved for summary judgment on both the seatbelt and glazing claims. The trial court denied MCI's motion and, over MCI's objections, permitted both claims to be submitted to the jury. The jury found that the motorcoach was defectively designed because it lacked passenger seatbelts of a specific design and lacked laminated glass in the side passenger windows. (App. 164, 166) The trial court denied MCI's post-verdict motions urging federal preemption and entered a judgment against MCI totaling $17,008,153.22. (App. 140–60)

MCI appealed to the Waco Court of Appeals—a Texas intermediate appellate court—which held that FMVSS 205 and FMVSS 208 do not preempt the jury's findings. (App. 97, 99) The court, however, reversed and remanded the case for further proceedings because the trial court had misapplied Texas's statute governing proportionate responsibility. (App. 133) Both sides filed a petition for review to the Texas

Supreme Court. MCI's petition argued for rendition of a take-nothing judgment based on preemption. The supreme court granted the petitions and affirmed the court of appeals' judgment. (App. 3)

## REASONS FOR GRANTING THE WRIT

The Texas Supreme Court held that FMVSS 205, which gives motor vehicle manufacturers a choice among several glazing options for side windows, including laminated glass and tempered glass, does not preempt a common-law claim that a motorcoach was defectively designed because the manufacturer did not use laminated glass. This holding directly conflicts with the holdings of at least two state courts of last resort, as the Texas Supreme Court expressly acknowledged in its opinion. The court below also held that FMVSS 208, which requires a motorcoach to have seatbelts in the driver position but does not require passenger seatbelts, does not preempt a defective-design claim based on the absence of passenger seatbelts. This holding conflicts with this Court's decisions in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), and *Williamson v. Mazda Motor of America, Inc.*, 562 U.S. ___ (2011),[1] as well as with decisions of other lower courts. The Court should grant certiorari to address these conflicts.

[1] Cited herein as follows: *Williamson*, Slip Op. at ___.

In addition, the Court should grant certiorari because this case presents an excellent vehicle for the Court to settle an important question of federal law with which a growing number of courts are struggling: how broadly (or narrowly) should lower courts view this Court's holdings in *Geier* and *Sprietsma* in determining the scope of implied preemption? The Texas Supreme Court took an extremely narrow view of *Geier* and an extremely broad view of *Sprietsma* in determining that defective-design claims were not preempted by the applicable agency regulations. Texas's reading of this Court's decisions, however, effectively eliminates the doctrine of implied conflict preemption—the existence of which the Court confirmed in both *Geier* and *Sprietsma*, and again most recently in *Williamson*.

In the alternative, because the Texas Supreme Court's decision misapplies *Geier* and is inconsistent with *Williamson*, the Court should at a minimum grant certiorari, vacate the judgment, and remand for further proceedings in light of *Williamson*. Under the Texas Supreme Court's opinion, *Geier* would not apply beyond its facts, meaning that no other Safety Act regulation can have preemptive effect. But *Williamson* makes clear that, although *Geier* is not as broad as some lower courts have believed, it is not as narrow as the Texas Supreme Court interprets it. Thus, this Court should give the Texas Supreme Court the opportunity to reconsider its restrictive reading of *Geier*.

## I. The Texas Supreme Court's decision conflicts with those of other lower courts and with prior decisions of this Court.

### A. The Texas court's holding on glazing conflicts with decisions of other state courts of last resort and with *Geier* and *Williamson*.

The federal regulation on window glazing, FMVSS 205, currently gives motorcoach and automobile manufacturers the choice to install laminated glass or tempered glass (among other options) in side passenger windows. *See* 49 C.F.R. § 571.205. The regulation gives manufacturers a choice because "no one type of safety glazing material can be shown to possess the maximum degree of safety under all conditions, against all conceivable hazards." ANSI/SAE Z26.1–1996 § 2.2. (*See* App. 18) In fact, NHTSA found that advanced glazing—which includes laminated glass—actually "increases the risk of neck injury" as compared to tempered glass. WILKE ET AL., EJECTION MITIGATION USING ADVANCED GLAZING: FINAL REPORT viii, x (Aug. 21, 2001); *see Morgan v. Ford Motor Co.*, 680 S.E.2d 77, 94 (W. Va. 2009).

Nevertheless, the jury in this case found that the motorcoach was defective because it had tempered glass in the passenger side windows. (App. 166) The jury's finding amounts to a requirement that, in Texas, a manufacturer must install laminated glass in motorcoach side windows and that manufacturers are foreclosed from installing tempered glass. The Texas Supreme Court held "that the jury's verdict

in favor of the Plaintiffs is not preempted by federal law." (App. 49)

The petition should be granted because this holding conflicts with decisions by other state courts of last resort considering the preemptive effect of FMVSS 205. Moreover, the implied-preemption test articulated by the Texas Supreme Court conflicts with this Court's decisions in *Geier* and *Williamson*.

### 1. The decision conflicts with decisions of state courts of last resort.

"Courts across the country . . . have struggled with the preemptive effect, if any, of [FMVSS] 205 and have reached opposite conclusions." *Priester v. Cromer*, 697 S.E.2d 567, 568 (S.C. 2010), *vacated and remanded*, 562 U.S. ___ (2011). The West Virginia Supreme Court explained, after noting conflicting interpretations of *Geier*: "[W]e are stuck between a rock and a jurisprudential hard place." *Morgan v. Ford Motor Co.*, 680 S.E.2d 77, 79 (W. Va. 2009). Even the Texas Supreme Court recognized that its decision conflicts with many cases from other jurisdictions. (App. 40 n.20)

Despite this conflict, the Texas court concluded that FMVSS 205 is merely "a minimum standard" and, thus, "the jury's finding that MCI should have used a different glazing material in the motorcoach here presents no obstacle to the accomplishment and execution of a federal policy." (App. 48) The Fifth Circuit reached the same decision in *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007).

These Texas and Fifth Circuit decisions conflict with decisions of two state courts of last resort, *Priester* and *Morgan*, which hold that the choice of glazing materials in FMVSS 205 is not a minimum standard but instead a deliberate policy objective that preempts a claim foreclosing one of the options. These decisions also conflict with a Tennessee appellate court decision, *Lake v. Memphis Landsmen, L.L.C.*, which involves the same motorcoach glazing claim as here. No. W2009-00526-COA-R3-CV, 2010 Tenn. App. LEXIS 200 (Tenn. Ct. App. Mar. 15, 2010).

In *Morgan*—a truck window glazing case—the West Virginia Supreme Court considered the same arguments that the Hintons make here, i.e., that FMVSS 205 is a minimum standard that does not offer choices to further a clearly defined federal policy. The court disagreed, holding that FMVSS 205 preempted the plaintiff's tort claim because NHTSA made a policy decision—based on safety concerns—to not mandate advanced glazing:

> FMVSS 205 permits the manufacturer to make a choice between available safety options for side-window glass; a design defect claim would foreclose choosing one of those options. We understand that the instant case seeks to impose liability for *only* one of the options allowed by FMVSS 205. But actions in the courts of each of West Virginia's 55 counties could theoretically, one-by-one, eliminate *all* of the options offered under FMVSS 205. In the worse case, regulation by juries could, in a piecemeal fashion, eviscerate the

> unitary federal regulation and leave manufacturers with no options for glazing materials in vehicle side windows . . . .
>
> [W]e are compelled to find that our decision must be controlled by *Geier*, because the NHTSA made a public policy decision to not mandate advanced glazing in side windows because of safety concerns that advanced glazing has a slightly increased risk of neck injuries . . . .
>
> We therefore find that because the NHTSA gave manufacturers the option to choose to install either tempered glass or laminated glass in side windows of vehicles in FMVSS 205, permitting the plaintiff to proceed with a state tort action would foreclose that choice and would interfere with federal policy.

*Morgan*, 680 S.E.2d at 94–95 (emphasis in original).

In *Priester*—another truck window glazing case—the South Carolina Supreme Court similarly held that FMVSS 205 is not a minimum standard, but rather gives manufacturers "a range of choices among different types of glazing materials" and states that manufacturers "shall conform" to those choices:

> [I]n the absence of a determination from the United States Supreme Court on this matter, we must render our best judgment as to whether Regulation 205 provides a manufacturer with options and, therefore, preempts Appellant's suit, or merely provides a safety

> floor and allows Appellant's suit to go forward. . . .
>
> In our view, the purpose of this regulation is to provide an automobile manufacturer with a range of choices among different types of glazing materials, as opposed to providing a minimum standard. Regulation 205 directs manufacturers that they "shall conform" to ANS Z26, which specifically provides manufacturers the option of using tempered glass for side windows. . . .
>
> Because we believe [the claim] would stand as an obstacle to achieving the purposes and objective of Regulation 205, this state tort action presents a conflict between federal law and state law. Thus, Regulation 205 preempts this state law claim . . . .

*Priester*, 697 S.E.2d at 571.[2]

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[2] In *Lake*, the Tennessee appellate court also disagreed with courts holding that "FMVSS 205 is only a minimum standard and that there is no federal policy which would be frustrated." 2010 Tenn. App. LEXIS 200, at *21. Looking carefully at the regulatory history behind FMVSS 205, the *Lake* court concluded that "a federal policy exists regarding the glass in side windows":

> In declining to adopt a specific requirement, the NHTSA intended to allow an option so that manufacturers could choose from other available safety options, such as side curtain airbags, to prevent ejection. This was both a cost decision, as the size of windows on vehicles would have to be modified in order to use advanced glazing, and a safety decision, as studies

(Continued on following page)

As the analysis in these cases makes clear, FMVSS 205 expresses a safety-based federal policy to give glazing options. Foreclosing one of those glazing options would present an obstacle to that significant regulatory objective. Yet the Texas Supreme Court held that FMVSS 205 is merely a minimum standard and, thus, cannot preempt a state law defective-design claim based on the use of tempered glass. This Court should grant certiorari to resolve this conflict among the lower courts on this important federal question.

### 2. The Texas court's implied-preemption test conflicts with *Geier* and *Williamson*.

Under ordinary conflict preemption, a Safety Act regulation preempts a state tort suit that "actually conflicts" with the regulation. *Geier*, 529 U.S. at 874. A conflict occurs when the claim "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 873. In *Williamson*, this Court affirmed these well-established principles and clarified that, to preempt,

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> showed an increased risk of neck injury upon impact with the advanced glazing . . . .
>
> While there is not a federal policy against the use of laminated glass in side windows, there is a federal policy that tempered glass should be one of the available safety options.

*Id.* at *24–26.

the federal regulatory objective must be "significant." Slip Op. at 5–6.

*Williamson* also clarifies two additional points. First, a regulatory choice does not always preempt. Second, NHTSA does not have to express a policy for a "variety and mix" in order for there to be preemption. In other words, *Geier* is not as broad as some courts hold, but *Geier* is not limited to its precise facts.

The federal objective behind FMVSS 205 is more like the objective behind the regulation in *Geier* than that in *Williamson*. NHTSA explained that it gave the choice for safety reasons—i.e., because it found that no type of glazing is superior to all others in all situations. Thus, unlike in *Williamson*, where the only reason for giving a choice was diminishing cost concerns, NHTSA's glazing choice was based on a significant regulatory objective related to safety.

This Court should grant review to resolve this conflict. At a minimum, as it did with *Priester*, the Court should grant certiorari, vacate the judgment, and remand for the Texas Supreme Court to reconsider its decision in light of *Williamson*.

### B. The Texas Supreme Court's holding on seatbelts conflicts with *Williamson*, *Sprietsma*, and other lower courts.

The jury found that the motorcoach was defective because it did not have passenger seatbelts. (App. 164) The federal regulation on passive restraints for motorcoaches, FMVSS 208, requires motorcoach manufacturers to install seatbelts only at the driver seating position. 49 C.F.R. § 571.208, S4.4. The jury's finding amounts to a requirement that, in Texas, a manufacturer must install seatbelts in driver *and* passenger seating positions.

The Texas Supreme Court held "that the jury's finding that MCI should have installed seatbelts on its motorcoach does not conflict with any federal law and is not preempted." (App. 37) In doing so, the Texas Supreme Court made two significant rulings: (1) FMVSS 208 is "silen[t]" with respect to passenger seatbelts (App. 25) and (2) for a safety regulation to have preemptive force, the agency must "affirmatively" take the "further step to disallow state regulation"—i.e., "indicate[ ] opposition to seatbelts and an affirmative desire to forbid their use." (App. 28, 31)

Certiorari should be granted because these rulings conflict with *Sprietsma*, *Williamson*, and decisions of other lower courts.

### 1. The decision reads *Sprietsma* too broadly.

The Texas Supreme Court relied heavily on this Court's opinion in *Sprietsma*. But *Sprietsma* involves a different safety act—the Federal Boat Safety Act—that has a unique regulatory history. *Sprietsma* does not affect preemption under the Motor Vehicle Safety Act, and it does not require an affirmative statement or desire forbidding state regulation.

In *Sprietsma*, the plaintiff died from injuries she suffered after being hit by the propeller on her boat. The plaintiff claimed that the boat was defectively designed because it had no propeller guard. The Boat Safety Act, however, is completely silent with respect to propeller guards—not just on the type of boat in question, but altogether silent.

Nevertheless, the defendant asserted that the Boat Safety Act preempted the plaintiff's state common-law claim because the Coast Guard considered but rejected a propeller guard standard. The Court recognized that regulatory silence could have preemptive force, as "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*-regulated, and in that event would have as much preemptive force as a decision *to* regulate." *Sprietsma*, 537 U.S. at 66 (emphasis in original). This Court rejected that argument in *Sprietsma*, however, primarily for two reasons.

This Court first carefully reviewed the Boat Safety Act's unique regulatory history and held that the Coast Guard's administrator specifically and explicitly expressed, from the agency's inception, an intent for states to regulate areas not expressly regulated by that Act:

> Indeed, history teaches us that a Coast Guard decision not to regulate a particular aspect of boating safety is fully consistent with an intent to preserve state regulatory authority pending the adoption of specific federal standards. That was the course the Coast Guard followed in 1971 immediately after the Act was passed, and again when it imposed its first regulations in 1972 and 1973. The Coast Guard has never taken the position that the litigation of state common-law claims relating to an area not yet subject to federal regulation would conflict with "the accomplishment and execution of the full purposes and objectives of Congress."

*Sprietsma*, 537 U.S. at 65–66. This is not a "neutral policy," like that of the Motor Vehicle Safety Act. *See Geier*, 529 U.S. at 870. To have preemptive effect under the Boat Safety Act, there must be a specific regulation or some other express statement forbidding states from regulating. Thus, in the context of the Boat Safety Act, regulatory silence does not preempt state law. But this analysis does not control preemption under the Motor Vehicle Safety Act, which *Geier* holds is governed by ordinary conflict-preemption principles. The Texas Supreme Court

does not address the unique regulatory history involved in *Sprietsma*.

Second, this Court confirmed that the Coast Guard's decision not to regulate was mere silence and not the functional equivalent of a decision to leave the area unregulated. The entire reason the Coast Guard gave for not issuing a regulation was the following:

> The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

*Id.* at 66. According to this Court, that statement revealed only a judgment that the available data did not meet the Boat Safety Act's stringent guidelines for federal regulation. *Id.* The Coast Guard's rejection of the propeller guard proposal was not a decision to preempt expressly preserved state law. *Id.* In the context of the Boat Safety Act's regulatory history, it was a decision to allow states to continue to regulate the area.

As will be discussed below, FMVSS 208's regulatory history with respect to seatbelts—and, particularly, seatbelts in motorcoaches—is far different and

is clearly not "silent." The Texas Supreme Court interprets *Sprietsma* too broadly and, thus, conflicts with *Sprietsma* and *Williamson*.

### 2. The seatbelt holding conflicts with *Williamson* and other lower court decisions.

The Texas court's seatbelt ruling also conflicts with *Williamson* and other lower courts. First, just as it did with respect to the glazing issue, the Texas Supreme Court looked at whether there was an "affirmative desire to forbid [seatbelts]." (App. 31) As *Williamson* confirms, the proper inquiry is whether NHTSA's decision to not require passenger seatbelts was based on a significant regulatory objective. *See Williamson*, Slip Op. at 5.

Moreover, the seatbelt holding conflicts with federal district courts and lower state courts holding that FMVSS 208 preempts a state tort law requiring passenger seatbelts on a motorcoach. *See Surles v. Greyhound Lines, Inc.*, No. 4:01-cv-00107, 2005 U.S. Dist. LEXIS 45765, at *17–18 (E.D. Tenn. 2005) (holding motorcoach passenger seatbelt claim preempted because it "directly conflicts with NHTSA's finding" "that there was not a safety need for safety belts" and it "conflicts with Congress's goal of establishing uniform standards on which the motor vehicle industry can rely"); *Lake*, 2010 Tenn. App. LEXIS 200, at *33 (holding motorcoach passenger seatbelt claim preempted because it "directly conflicts with

the findings and requirements of the NHTSA" and "would absolutely conflict with Congress' goal of uniformity"); *Doomes v. Best Transit Corp.*, 68 A.D.3d 504, 506 (N.Y. App. Div. 2009), *leave to appeal granted*, 934 N.E.2d 892 (N.Y. 2010) (holding motorcoach passenger seatbelt claim preempted because "it conflicts with the federal goal of establishing uniform standards"); *Schunck v. Del. Transit Corp.*, No. 06C-07-008, 2007 Del. Super. LEXIS 165, at *9 (Del. Super. 2007) ("To require manufacturers to also equip buses weighing more than 10,000 pounds with passenger restraint devices, as Schunck seeks to do with his common-law tort claim, would conflict with NHTSA's regulatory framework.").

### C. The Texas Supreme Court's opinion conflicts with prior decisions of this Court —including *Geier* and *Sprietsma*—by doing away with implied preemption.

This Court also should grant review because the Texas Supreme Court's holdings eliminate traditional implied-preemption analysis and instead require an affirmative indication of preemptive intent. With respect to glazing, the Texas Supreme Court found no preemption because NHTSA did not "state a positive desire to preserve the [manufacturer's choice of glazing] by forbidding contrary state regulation." (App. 43) With respect to passenger seatbelts, the court concluded that NHTSA did not "affirmatively" take the "further step to disallow state regulation" and "indicate[] opposition to seatbelts and an affirmative

desire to forbid their use." (App. 28, 31) Thus, Texas requires some expression of the agency's intent to preempt common-law claims.

As this Court held in *Geier* and recently confirmed in *Williamson*, ordinary obstacle-preemption principles still apply under the Safety Act. Slip Op. at 5. There is no requirement that the agency expressly disallow state regulation. Indeed, *Geier* makes clear that "one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict." *Geier*, 529 U.S. at 885. Rather, the "basic question" is whether the state law claim "actually conflicts" with the safety standard. *Id.* at 874. A conflict occurs when the claim "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 872. *Williamson* adds only that the federal objective must be "significant." Slip Op. at 5.

This Court should grant review to correct this conflict on an important federal question. At a minimum, the Court should grant certiorari, vacate the judgment, and remand for the Texas Supreme Court to reconsider its decision in light of *Williamson*.

## II. The Court should grant review because this case involves important issues of federal law.

### A. The issues in this case go beyond glazing and motorcoach passenger seatbelts, striking at the heart of implied preemption.

This case warrants review because it presents the Court with the opportunity to rule on the preemptive effect of NHTSA standards that apply to motorcoaches, an industry that operates nationwide and transports millions of people each year. Yet, this Court has never considered a motorcoach case, which involves different federal uniformity concerns than cases involving passenger vehicles.

Further, with respect to glazing, the same standard applies to all vehicles. Thus, the Court's guidance on FMVSS 205 would extend beyond motorcoaches to all motor vehicles. There is already a well-developed split among numerous courts on these issues. The issue is ripe for this Court's consideration.

But the case has even broader implications—it would allow the Court to further clarify far-reaching issues of implied preemption. How broad is the "choice as significant objective" standard of *Geier* and *Williamson*? Likewise, does implied preemption really require an express statement of preemptive intent? These are questions that will affect many present and future preemption cases, including those not involving vehicle safety.

The Texas Supreme Court's opinion makes one thing clear—it wants to do away with, or at least minimize, implied preemption. This Court should grant review to clarify that no express statement of intent is necessary for obstacle preemption.

It is also worth noting that the Texas court incorrectly applied the presumption against preemption, which undoubtedly helped form the basis of its non-preemption holding. (*See* App. 25) Neither *Geier* nor *Williamson* discusses the presumption against preemption. The Court in *Geier* instead analyzed the relationship between the express preemption provision and the saving clause of the Safety Act. While noting that the saving clause preserves some state common-law claims, the Court "declined to give broad effect" to the saving clause. *Geier*, 529 U.S. at 870. The Court concluded that the Safety Act has a "neutral policy" towards preemption and actually "foresees" rather than forecloses preemption of state common-law tort actions with which it conflicts. *Id.*

The Texas Supreme Court rejected this analysis and instead relied heavily on *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). But *Wyeth* does not control. *Wyeth* is a warnings case involving a different statute—the Federal Food, Drug, and Cosmetic Act ("FDCA")—that has a saving clause but not an express preemption provision. *Id.* at 1200. In fact, Congress enacted an express preemption provision in the FDCA relating only to medical devices and it could have, but did not, enact one for prescription drugs. *Id.* According to the Court, Congress's "silence" with respect to the preemptive effect of prescription drugs was significant.

*Id.* The Safety Act is not silent—it has an express preemption provision. Because *Wyeth* involves a completely different regulatory framework, its application of the presumption against preemption does not control.

In any event, this Court made clear in *Geier* that, at least under the Safety Act, the policy towards preemption is neutral and ordinary conflict preemption applies. The Texas Supreme Court's decision brings both of these principles into question. This Court should grant review to clarify the viability of implied preemption.

### B. Motorcoaches uniquely implicate concerns of federal uniformity.

The Court has never considered a motorcoach case, which implicates issues of federal uniformity in a unique way. In contrast to passenger vehicles, one of the primary purposes of a motorcoach is to travel intercity and interstate. If state court juries are permitted to establish the law on bus design, it would be impossible for a manufacturer to comply with the varying standards it could encounter on a single trip. While a jury in Texas may find that a bus was defectively designed for a rollover accident by having tempered glass side windows instead of laminated glass, a jury in Oklahoma may find that a bus was defectively designed for a side-impact collision by installing laminated glass instead of tempered glass. Likewise, while a jury in Houston may want no seatbelts, a jury in Dallas may want two-point lapbelts, a jury in Santa Fe may want three-point

seatbelts, and a jury in Denver may want four-point seatbelts. A bus manufacturer cannot design its bus to comply with all of those varying standards. It cannot simultaneously have no seatbelts, lapbelts, three-point seatbelts, and four-point seatbelts.

As *Geier* explains, the Safety Act "reflects a desire" on behalf of NHTSA "to subject the industry to a single, uniform set of federal safety standards." *Geier*, 529 U.S. at 871. This desire applies with particular force to intercity and interstate motorcoaches. This Court should grant certiorari to resolve whether the Hintons' claims present an obstacle to this federal uniformity objective.

### C. The Court will be able to resolve these questions in this case.

This case presents a good vehicle to answer these important federal questions. First, the facts underlying preemption are not in dispute. Second, the case gives the Court the opportunity to address several issues at one time—both specific to the regulations involved and generally on broader preemption principles. Third, a number of lower courts have analyzed the issues, and there is no need to wait for other conflicting decisions.

In addition, this case will have broader application than *Sprietsma*. As discussed above, *Sprietsma* involved a unique regulatory history in which the Coast Guard expressly preserved existing state law claims. By rejecting a propeller guard proposal, the Coast Guard essentially said that regulation of

propeller guards was up to the states. That is not the case with the Safety Act.

## III. The Texas Supreme Court erred in rejecting preemption.

The Texas Supreme Court incorrectly ruled that FMVSS 205 and FMVSS 208 do not preempt the jury's common-law rules. *Williamson* clarifies that the central question is whether the state tort claim presents an obstacle to a "significant" federal regulatory objective. Slip Op. at 5–6. To determine preemption, a court must identify and weigh the federal objectives. *See id.* at 6–10. In this case, the federal objectives behind FMVSS 205 and FMVSS 208 favor preemption.

### A. FMVSS 205 preempts the glazing claim.

The Texas Supreme Court held that FMVSS 205 does not preempt the design defect claim regarding side windows because, according to the court, all safety standards are intended to be minimum standards and no minimum standard can preempt a state common-law claim. (App. 39) But not all safety standards are minimum standards. If a standard expresses a significant regulatory objective, a common-law claim that obstructs or frustrates that objective is preempted. *See Williamson*, Slip Op. at 5.

### 1. The federal objective behind FMVSS 205 is significant and is more like the regulation in *Geier* than that in *Williamson*.

*Williamson* involved a "choice" regulation—a choice between type 1 (lap only) and type 2 (lap/shoulder) seatbelts in the rear-center seat of a passenger vehicle. *Id.* at 3. Unlike in *Geier*, there was no concern over consumer acceptance or safety and no desire for a mix of devices. *Id.* at 8. Instead, the Department of Transportation ("DOT")—the department in charge of NHTSA—determined that type 2 seatbelts were safer and encouraged manufacturers to install them. *Id.* at 8–9. The only reason DOT did not immediately require lap/shoulder belts was cost. *Id.* at 10. According to the Court, cost alone in this context was not sufficient to show that the choice was a significant regulatory objective. *Id.* at 11.

This case is more like *Geier* than *Williamson*. As in *Geier*, NHTSA had very specific reasons for giving motorcoach manufacturers a choice of glazing options in FMVSS 205: these were the best options available. FMVSS 205 provides glazing requirements by explaining that manufacturers "shall conform" to the requirements in ANSI/SAE Z26.1-1996, the American National Standard Institute's standard for safety glazing materials in motor vehicles. This standard requires laminated glass in windshields and requires either laminated glass or tempered glass for passenger side windows. ANSI/SAE Z26.1–1996 §§ 3.2, 3.3.

NHTSA stated that the purpose of glazing materials is threefold: (1) to reduce injuries resulting from impact to glazing surfaces, (2) to ensure a necessary degree of transparency in windows for driver visibility, and (3) to minimize the possibility of occupants being thrown through the vehicle window in collisions. 49 C.F.R. § 571.205, S2. Manufacturers have a choice between tempered glass and laminated glass because each performs differently under different crash situations:

> One safety glazing material may be superior for protection against one type of hazard, whereas another may be superior against another type. Since accident conditions are not standardized, no one type of safety glazing material can be shown to possess the maximum degree of safety under all conditions, against all conceivable hazards.

ANSI/SAE Z26.1–1996 § 2.2. This language makes clear that no perfect choice was available that would allow NHTSA to pick one material over the other.

Studies initiated by NHTSA on glazing confirm this conclusion. In its 55-page Final Report, NHTSA considered but rejected a regulatory requirement for advanced glazing, which includes laminated glass. NHTSA first noted the lower rate of neck injuries associated with tempered glass than with any other glazings:

> Despite wide variability, impacts into advanced glazings resulted in higher neck shear loads and neck moments than those

> into tempered glass. Impacts into standard tempered glass resulted in axial loads that were comparable to those in advanced glazings. In each case, the lowest neck injury measurements were obtained from tempered glass impacts.

WILKE ET AL., EJECTION MITIGATION USING ADVANCED GLAZING: FINAL REPORT viii (Aug. 21, 2001). The Report noted that "advanced side glazing appears to increase the risk of neck injury . . . [and the] agency is extremely reluctant to pursue a requirement that may increase injury risk for belted occupants to provide enhanced safety benefits primarily for unbelted occupants, by preventing their ejection from the vehicle." *Id.* at x. NHTSA concluded that it was "more appropriate to devote its research and rulemaking efforts to projects other than ejection mitigation through advanced glazing" and that it would "continue to examine a potential requirement for advanced side glazing." *Id.* The agency stated that it would explore ejection mitigation through other means, such as side airbag curtains, and that it would shift its focus "from advanced glazing to development of more comprehensive, performance-based test procedures." *Id.* at xi.

Together, the commentary to FMVSS 205 and the history of NHTSA's studies confirm that the decision to allow a choice between tempered glass and laminated glass was a significant regulatory objective based on a variety of sound reasons, including safety. This regulation is not like the one at issue in *Williamson*, where cost was the only reason for the choice.

Accordingly, a Texas tort law requiring a manufacturer to use only one of the choices endorsed by NHTSA is an obstacle to the accomplishment of the full purposes and objectives of Congress, and is a contrary rule of law. For these reasons it is preempted. *See Geier*, 529 U.S. at 875–83.

### 2. The Texas court improperly assumes that all safety standards are minimum standards.

In addition, the Texas Supreme Court improperly based its ruling on an assumption that Congress "generally intended" all Safety Act regulations "to set minimum standard[s]." (App. 39) This assumption is wrong.

First, the court appears to make this assumption based in part on the "Definitions" section of the Safety Act. (*See* App. 38–39) That section defines "motor vehicle safety standard" to mean "a minimum standard for motor vehicle or motor vehicle equipment performance." 49 U.S.C. § 30102(a)(9). But nowhere in the Act does it say that, for purposes of preemption, Congress intended all safety standards to be a non-preemptive floor. As *Geier* acknowledges, the federal government intended some rules in the Safety Act "to be an absolute requirement" and others to be "only a minimum one." *Geier*, 529 U.S. at 869. In fact, FMVSS 205 expressly states that it "specifies *requirements* for glazing materials for use in motor vehicle and motor vehicle equipment." 49 C.F.R.

§ 571.205, S1 (emphasis added). It is simply incorrect to say that Congress generally intended the safety standards to be minimum standards for preemption purposes. (*See* App. 39)

Second, the Texas court fails to recognize that some standards are expressly minimum performance standards and others are requirements. Some standards actually use the words "minimum" or "at least" —e.g., "Maintain the 50 pound load for *at least* 5 seconds" (S7.1.1.5(c)(5)), "The intersection of the upper torso belt with the lap belt . . . shall be *at least* 6 inches from the front vertical centerline of a 50th-percentile adult male occupant" (S7.1.3), "The deceleration rate is *at least* 20g for a *minimum* of 0.04 seconds" (S8.3.6), and "The vehicle shall be equipped with *at least* one telltale which emits light whenever the passenger air bag system is deactivated . . . ." (S19.2.2) *Geier* recognized this important distinction. When explaining that some standards create "only a floor," the *Geier* Court noted—as its only example—minimum requirements for brake performance. 529 U.S. at 868 (citing Brief for United States as Amicus Curiae).

Other courts have likewise recognized this distinction. For example, in *Bradley v. Fontaine Trailer Co.*, a federal district court held that a state law claim that a tractor trailer lacked additional lighting was not preempted by FMVSS 108, which required "*at least* the number of lamps, reflective devices, and associated equipment specified in Table I." No. 3:06-cv-62, 2009 U.S. Dist. LEXIS 22598, at *14–15 (D.

Conn. 2009). The court noted, however, that FMVSS 108 might preempt a claim for a different type of light than required in the standard. *Id.* at *16–17. These examples make sense. A minimum braking distance or minimum number of lights standard is different from a type of brake or light requirement. A manufacturer can add more lights without being inconsistent with a requirement for at least a lesser number. The words "minimum" or "at least" are noticeably missing in FMVSS 205's glazing choice standard. As quoted above, FMVSS 205 instead says it specifies "requirements." 49 C.F.R. § 571.205, S1.

Third, the Texas court reads the saving clause too broadly. The court may have been influenced by the Solicitor General's brief in *Williamson*, which states that an "option alone" standard for preemption would "greatly undermine[ ]" the saving clause. (App. 48) But FMVSS 205 is not an option-alone standard, and this statement was made many years after Congress enacted the Safety Act and NHTSA issued the regulations at issue and, thus, carries less weight. *See Wyeth*, 129 S. Ct. at 1203. Moreover, *Geier* makes clear that it "declined to give broad effect" to the saving clause. *Geier*, 529 U.S. at 870. The Court concluded that the Safety Act has a "neutral policy" towards preemption and actually "foresees" rather than forecloses preemption of state common-law tort actions with which it conflicts. *Id.* The Court even notes that the words "compliance" and "does not exempt" in the saving clause "sound as if they simply bar a special kind of defense, namely, a defense that

compliance with a federal standard automatically exempts a defendant from state law." *Id.* at 869. The saving clause is not as broad as the Texas Supreme Court has held.

Lastly, *Geier* does not limit its holding to the specific facts of its case—i.e., a policy desiring a mix of options for a time so that the effects could be studied further. If the policy in *Geier* were read that narrowly, it would be unique and no other regulation would preempt state law. The glazing policy here anticipates that there will be variety by giving a choice and saying no one choice is better than another. This Court should grant review to clarify the reach of *Geier*.

### B. FMVSS 208 preempts the seatbelt claim.

The seatbelt claim also is preempted. The Texas Supreme Court held that FMVSS 208 is silent with respect to passenger seatbelts and that regulatory silence cannot preempt state action absent an express statement forbidding state regulation and forbidding the safety device at issue. (App. 25, 28, 31) But FMVSS 208 is not silent. The standard requires passenger seatbelts on motorcoaches weighing less than 10,000 pounds. 49 C.F.R. § 571.208, S4.4.5 NHTSA did not forget about the larger motorcoaches —it spoke loudly for decades about why it saw no safety reason to require passenger seatbelts on them. Moreover, the jury verdict on the seatbelt claim presents an obstacle to the accomplishment of a significant federal objective.

### 1. FMVSS 208 is not silent with respect to passenger seatbelts in motorcoaches.

The Texas Supreme Court first erred by characterizing FMVSS 208 as "silent" with respect to passenger seatbelts on motorcoaches. (*See* App. 25) Unlike the Boat Safety Act in *Sprietsma*—which never mentions propeller guards—FMVSS 208 addresses the necessity for seatbelts at every seating position in every type of vehicle. The word "seatbelt" is used literally hundreds of times. There are also bus-specific standards. Buses under 10,000 pounds are required to have seatbelts for both the driver and passengers. With respect to larger buses over 10,000 pounds—which includes motorcoaches like this one—NHTSA considered, but rejected, a proposal for passenger seatbelts. As a result, the regulation says seatbelts are required for the "driver only."

For this decision to be preemptive, NHTSA was not required to issue a regulation expressly stating "no seatbelts for passengers" or "seatbelts optional for passengers." But if this is what the Texas Supreme Court was looking for, NHTSA has already said this in the 1974 Notice of Proposed Rule Making ("NPRM"), where it stated that motorcoaches were safe without seatbelts and that it would require them in the future "if it found them desirable." 38 Fed. Reg. 4776 (Feb. 22, 1973) (codified at 49 C.F.R. pt. 571).

At least two lower courts considering passenger seatbelt claims in motorcoaches agree that NHTSA

was not merely silent. The Tennessee court of appeals in *Lake* explained:

> After examining the regulation itself, we find that FMVSS 208 is not silent with regard to passenger seatbelts. FMVSS 208 addresses the necessity of seatbelts in all buses. It requires seatbelts for passengers in smaller buses, but only requires a seatbelt for the driver in larger buses. This does not mean that there is not a federal standard for large buses. If a manufacturer wishes to build a bus without seatbelts, it must build that bus so that its gross vehicle weight is greater than 10,000 pounds.

2010 Tenn. App. LEXIS 200, at *31. A Delaware state court also explained:

> NHTSA has studied the issue and concluded that large buses are, by virtue of their weight, safer than small buses. NHTSA dealt with this by requiring passenger restraints on small buses, but not on large buses. This, however, does not mean that there is no standard for large buses. There is a 10,000 pound weight standard. A manufacturer can, under FMVSS 208, either build buses weighing less than 10,000 pounds with passenger restraint devices, or buses weighing more than 10,000 pounds without passenger restraint devices, or do both. Thus, for a manufacturer to build a bus without passenger

> restraint devices, the bus must weigh more than 10,000 pounds.

*Schunck*, 2007 Del. Super. LEXIS 165, at *8–9.

The conclusion that NHTSA was not silent is also confirmed by a 1992 letter by NHTSA's Chief Counsel, Paul Jackson Rice, responding to an inquiry from MCI about proposed New York State legislation requiring seatbelts in all buses. (*See* App. 31) Mr. Rice first pointed out that a safety standard relating to occupant crash protection on buses was in effect for buses over *and* under 10,000 pounds. For buses over 10,000 pounds, the standard required one of two options: a complete passenger protection system or a belt system *for the driver only*. He explained that if the law required belts at positions other than the driver's, it would be preempted. The letter is important because it shows that a NHTSA representative believed, two years before the bus here was manufactured, that there *is* a regulation for passenger seatbelts on motorcoaches that can have preemptive force.

This case is not like *Sprietsma* in which the Coast Guard essentially threw its hands up to regulation and, instead, invited states to regulate propeller guards. FMVSS 208 is not silent with respect to seatbelts. An occupant-protection standard exists for passengers in motorcoaches.

### 2. The seatbelt claim presents an obstacle to a significant regulatory objective.

The test under *Geier* and *Williamson* is whether there is a significant regulatory objective behind the regulation, and whether the state tort suit would present an obstacle to that objective. Although *Williamson* specifically involves a "choice" regulation, it is not so limited. Moreover, FMVSS 208 gives manufacturers the choice between installing seatbelts or not installing seatbelts, or to focus on other types of occupant protection, like seat design, roof strength, compartmentalization, and side-curtain airbags. This is similar to the line of cases cited by the Texas Supreme Court discussing a decision to leave an area "unregulated." A decision to leave passenger seatbelts unregulated does not, as the Texas Supreme Court implies several times, mean that NHTSA must express an intent to forbid seatbelts. (*See* App. 25, 29 n.16, 30) It means simply that manufacturers should have the option—without facing enormous civil liability in state common-law actions—to decide whether or not to install seatbelts. What is the difference between issuing a regulation that says "seatbelts required for driver only"—like here—and one that says "seatbelts required for driver but manufacturer has option to install or to not install seatbelts at passenger seats"?

The question is thus, like in *Williamson*, whether there is a significant policy objective to not requiring passenger seatbelts. The answer is "yes."

### a. The regulatory history shows a significant federal objective.

The relevant agency reports, studies, and data show that NHTSA decided that a standard requiring passenger seatbelts was not appropriate and, therefore, it did not approve such a standard.

From the beginning, seatbelts were not required in motorcoaches. In 1966, when Congress enacted the Motor Vehicle Safety Act, Congress considered but rejected a proposed bill to require seatbelts in motorcoaches. Likewise, in 1973, NHTSA proposed a seatbelt study but, after a year, NHTSA again decided against seatbelts and said it would propose a standard for seatbelts "in the future . . . *if they are found desirable*." 38 Fed. Reg. 4776 (Feb. 22, 1973) (emphasis added). Thus, unlike the regulation in *Williamson*—in which DOT actually encouraged the use of type 2 seatbelts—NHTSA expressly stated that it did not believe passenger seatbelts were more desirable than not having seatbelts.

Four years later, in 1977, there was another study confirming that passenger seatbelts were not recommended. That study—commissioned by DOT—investigated the available information pertinent to seatbelts in intercity buses, including expected benefits and costs. The study ultimately found that

passenger seatbelts on motorcoaches were not recommended, and made the following important findings:

(1) ejections were not a significant problem and fatality rates were very low;

(2) the impact of seatbelts is not always positive and depends on the severity and type of accident;

(3) the voluntary use rate of seatbelts would be very low—about 10.9%; and

(4) the financial cost of retrofitting buses to include seatbelts would be significant—between $3 million and $4 million annually for the first five years.

STANSIFER ET AL., INSTITUTE FOR RESEARCH IN PUBLIC SAFETY, ANALYSIS FOR NEED FOR PASSENGER SAFETY BELT REQUIREMENTS IN INTERCITY BUSES 10–18, 61–100 (Sept. 30, 1977) (Study commissioned by and prepared for DOT). Based on these factors, the study concluded that seatbelts for motorcoaches were not recommended and, generally, the present seat requirements were working very well. *Id.* at 101. The study's primary recommendation was to increase the energy-absorbing design of seats. *Id.* In short, as this study prepared for DOT shows, NHTSA made a deliberate, well-reasoned decision to not recommend seatbelts.

NHTSA's intent was confirmed by the 1992 Rice letter, mentioned above, which also stated that "NHTSA expressly determined that there is not a safety need for safety belts or another type of

occupant crash protection at these seating positions." As one court explained, "we can rely on this letter for the policy and reasons behind the requirements of FMVSS 208. The NHTSA determined that seatbelts should not be required for passengers on large buses due to both safety and cost concerns."[3] *Lake*, 2010 Tenn. App. LEXIS 200, at *32.

**b. With this regulatory history, case law supports preemption.**

This case is like *Geier* where, because of competing concerns of costs, safety, technical capabilities and public use, the regulatory agencies decided not to require a safety device. *See Geier*, 529 U.S. at 875–81. Here, NHTSA conducted formal rulemaking, compared the relative performance of the two options, costs, the very low use of seatbelts, the low number of fatalities, and the mixed impact seatbelts would have on reducing injuries and fatalities. After balancing competing concerns, it chose to not require seatbelts and to instead give manufacturers the choice. This

[3] Although NHTSA proposed a rule in 2010 that would require lap and shoulder restraint systems on all newly manufactured motorcoaches, this proposed rule would not require used buses to be retrofitted. 75 Fed. Reg. 50,955, 50,960 (Aug. 18, 2010) (to be codified at 49 C.F.R. pt. 571). NHTSA noted that retrofitting may not be structurally or economically feasible. *Id.* at 10. Thus, more than 15 years after the motorcoach in question was manufactured and sold, NHTSA is still considering whether it will require passenger seatbelts in motorcoaches, and only prospectively.

was not a cost-alone situation, like in *Williamson*. Instead, NHTSA's policy objective to refuse to add a seatbelt requirement for passengers was deliberate, significant, and based on safety reasons, that is, there was no safety reason to require passenger seatbelts.

This was also not a non-decision like *Sprietsma*. NHTSA did not, like the Coast Guard in that case, leave motorcoaches unprotected or reject a proposal because of a lack of data. By refusing to require seatbelts for passengers, NHTSA expressed its desire to rely on a different safety method, and it did so *because* of the data—data indicating that seatbelts would not significantly alter injury statistics, were extremely expensive, and were rarely used by passengers, making them even less effective.

Because of the decision below, a jury in Waco, Texas, has imposed a requirement on motorcoach makers that Congress and NHTSA both decided was unnecessary. The jury's common-law rule would interfere with NHTSA's finding that seatbelts are not needed, the method NHTSA has chosen to provide motorcoach safety, and, generally, Congress's goal of uniformity in the motor vehicle industry. It is therefore preempted.

## PRAYER

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# IN THE SUPREME COURT OF TEXAS

No. 09-0048

MCI SALES AND SERVICE, INC.,
F/K/A HAUSMAN BUS SALES, INC. AND
MOTOR COACH INDUSTRIES MEXICO, S.A. DE C.V.,
F/K/A DINA AUTOBUSES, S.A. DE C.V., PETITIONERS,

v.

JAMES HINTON, INDIVIDUALLY AND AS
REPRESENTATIVE OF THE ESTATE OF
DOLORES HINTON, DECEASED, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

**Argued March 24, 2010**

JUSTICE GUZMAN delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE JOHNSON, JUSTICE WILLETT, and JUSTICE LEHRMANN joined, and in which CHIEF JUSTICE JEFFERSON joined as to Parts I and II.

CHIEF JUSTICE JEFFERSON filed an opinion, dissenting in part.

JUSTICE GREEN did not participate in the decision.

This appeal arises from a jury's verdict in a suit brought against the manufacturer, importer, and distributor of a motorcoach. In 1995, when the

motorcoach at issue here was manufactured, federal safety regulations governing the performance of these motorcoaches neither required nor forbade passenger seatbelts. These same regulations allowed manufacturers to choose between several types of glazing materials for use in the motorcoaches' windows, and a manufacturer complied by using one of the required types. We must decide whether that regulatory silence and that choice evidence a congressional intent to preempt a McLennan County jury's finding that the manufacturer of a motorcoach should have installed passenger seatbelts and should have used another permitted type of glazing material. Because we conclude that the jury's verdict which is grounded in this state's common law does not present any obstacle to the accomplishment of the federal regulatory scheme's purpose, we hold that the federal safety standards at issue do not preempt state law.

We also apply Chapter 33 of the Texas Civil Practice and Remedies Code to a plan adopted by a bankruptcy court to apportion a debtor's insurance proceeds among a group of creditors who filed claims against the bankruptcy estate. The unique plan allowed the claimants to either accept a mediated percentage of the proceeds or to litigate their claims before a special judge. Even if the claimants chose the latter course, their recovery was capped at 110% of the mediator's award, and the claimants could agree at any time to full or partial distributions to any or all of the claimants. We must decide if this plan renders the debtor—who purchased the insurance

policy funding the plan and whose further liability was discharged in bankruptcy—a settling person under Chapter 33 for purposes of determining proportionate liability. We conclude that it does. Accordingly, we affirm the court of appeals' judgment and remand to the trial court for further proceedings consistent with this opinion.

## I. Background

On February 14, 2003, a group of friends chartered a bus[1] from Central Texas Trails to take them from Temple to Dallas for a concert. Heavy rain and fog reduced visibility, and as the bus crested a hill on Interstate 35 south of Waco, the driver saw that traffic had stopped due to an accident farther north. He attempted to change lanes to increase his stopping distance, but another car cut him off, so he steered into the earthen median and lost control of the bus. It crossed the median into southbound traffic and collided with a large sport utility vehicle, spun counterclockwise, and tipped over on its right side. The bus slid across the southbound lanes and came to rest in the ditch on the far side of the road. Most of the large, non-laminated glass windows on the right side of the bus shattered when it tipped over. The passengers were tossed from their seats and some were ejected

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[1] Motorcoach, intercity bus, and bus are used interchangeably in this opinion, but are distinguished from transit buses. *See* Notice of Public Meeting on Motorcoach Safety Improvements, 67 Fed. Reg. 14,903 (Mar. 28, 2002).

through the broken windows. Five passengers were killed and several others were injured to varying degrees.

The bus owner and operator, Central Texas Trails, Inc., Central Texas Bus Lines, Inc., and Kincannon Enterprises, Inc. (collectively Central Texas), filed for Chapter 11 bankruptcy protection shortly after the accident. The bus crash victims filed creditor claims against Central Texas in the bankruptcy court. Central Texas maintained a $5 million liability insurance policy, and the carrier paid the policy limits into the bankruptcy court's registry, creating a liability fund. The bus crash claimants participated in non-binding mediation, the goal of which was to formulate a plan for apportioning the fund. The mediator assigned a percentage of the fund to each claimant, and these percentages were incorporated into a plan submitted to the bankruptcy court for approval, which was given on October 21, 2003. Under the "Apportionment Plan," a claimant could accept the mediator's percentage and immediately receive that portion of the liability fund. If the claimant chose not to accept the mediator's allocation, the claimant participated in a "Litigation Plan." Under this plan, the claimants tried their claims to a special judge agreed to by the participants, and their recovery under this plan was capped at 110% of the mediator's allocation. Further, the parties could agree at any time to approve a full or partial distribution to any or all participants. Central Texas's tort liability

in excess of the liability fund was discharged upon approval of its reorganization plan the following year.

On June 26, 2003, a group of the injured bus occupants (or their estates) and their relatives (the Plaintiffs)[2] filed suit against Motor Coach Industries Mexico, S.A. de C.V., and MCI Sales and Service, Inc., the bus's manufacturer, importer, and distributor (collectively MCI), alleging the motorcoach was defectively designed because it lacked passenger seatbelts and laminated-glass windows. MCI attempted to join Central Texas and the bus driver as responsible third parties, but the trial court denied the motion and also refused to submit a question asking the jury if Central Texas and the driver were liable as responsible third parties or as settling parties to determine proportionate liability. Following a jury trial, the jury found for the Plaintiffs, making separate causative findings as to each claim. The jury found that the lack of seatbelts caused injuries to all of the Plaintiffs, and the lack of laminated-glass windows caused injuries to those ejected from the bus. The jury awarded over $17 million in damages.

After the jury's verdict but before entry of judgment, the Plaintiffs, all of whom opted for resolution

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[2] To be clear, the bus crash victims who submitted claims in the bankruptcy proceeding are a larger group than the Plaintiffs here. Some of these claimants opted for compensation under the Apportionment Plan, leaving about half of the insurance proceeds for distribution to those who chose to participate in the Litigation Plan.

of their claims against Central Texas via the Litigation Plan, appeared before the special judge. The judge found that the bus driver's negligence proximately caused the accident that produced the Plaintiffs' injuries and that he was acting within the scope of his employment with Central Texas. Further, the judge determined that the jury's damage awards in this case, with one exception, significantly exceeded the 110% maximum recovery under the Litigation Plan. Limiting the one participant's recovery to what the jury awarded, the judge capped the remaining damage awards at the 110% maximum. Because of the limited funds, however, the awards were prorated so that each participant received a relative percentage of the actual award. In the end, each Litigation Plan participant (again, with the one exception) received a sum that is within two percent of the amount allocated by the mediator.[3] The bankruptcy judge approved the special judge's report, and the payments were made. Thereafter, the trial court in this case entered judgment, adjusting the damage awards to account for the funds received under the Litigation Plan.

MCI appealed, and the court of appeals reversed and remanded. 272 S.W.3d 17, 20. As relevant here, the court rejected MCI's preemption arguments but agreed that the trial court abused its discretion by

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[3] One participant received less than the amount assigned by the mediator in line with the jury findings in the trial court.

not submitting a question to the jury regarding Central Texas and the bus driver's proportionate liability as settling persons. MCI then petitioned this Court for review of the preemption issues, and the Plaintiffs cross-petitioned for review of the proportionate responsibility issue. We granted both petitions and consider the issues in order, beginning with federal preemption.

## II. Federal Preemption

The Supremacy Clause dictates that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Thus, a law passed by Congress—acting within its enumerated powers—and signed by the President preempts any state law to the contrary, rendering it without effect. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Mills v. Warner Lambert Co.*, 157 S.W.3d 424, 426 (Tex. 2005) (per curiam); *see also Wyeth v. Levine*, 129 S. Ct. 1187, 1206–07 (2009) (Thomas, J., concurring in the judgment) (noting the two structural limitations on the federal government's power to preempt state laws, namely, the enumerated powers of Congress and the procedural requirements to enact a law, including bicameral passage and presentment to the President). Federal regulations properly adopted by an agency acting within its congressionally delegated authority likewise preempt a contrary state

law. *E.g., City of New York v. FCC*, 486 U.S. 57, 63–64 (1988) (citing *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986)).

Congress may expressly preempt state law by means of statutory language, *see, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001), or it may do so impliedly in one of two ways, by "so thoroughly occup[ying] a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it,'" *Cipollone*, 505 U.S. at 516 (quoting *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982) (quotation marks omitted)), or by enacting a law that actually conflicts with state law, *see id.* (citing *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983)). A state law actually conflicts with a federal law when compliance with both is impossible or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *accord Great Dane Trailers*, 52 S.W.3d at 743. The latter kind of conflict preemption, sometimes called obstacle preemption, is the only theory of preemption advanced by MCI in this case. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868 (2000) (holding that the National Traffic and Motor Vehicle Safety Act's express preemption clause does not apply to common-law tort actions).

As the Supreme Court has observed, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth,* 129 S. Ct. at 1194 (quotation marks omitted). When Congress has explicitly stated that its legislation preempts state law, that intent is plain. *See, e.g., Geier,* 529 U.S. at 867–68 (concluding that the Safety Act's express preemption clause preempts nonidentical standards contained in state legislation and regulations). At other times, Congress does not expressly state its preemptive purpose, but such intent is discoverable through the statutory language and structure, as when Congress occupies a field of regulation and leaves no room for states to operate. *See, e.g., City of Burbank v. Lockheed Air Terminal Inc.,* 411 U.S. 624, 633 (1973) ("It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption."). But when preemption is premised on the obstacle a state law erects to accomplishing a federal purpose, divining that intent can be more challenging.[4] To discover the federal purpose with

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[4] Justice Thomas has gone so far as to question whether implied obstacle preemption can be reconciled with the Supremacy Clause's mandate that only federal law can preempt state law: "Congressional and agency musings, however, do not satisfy the Art. I, § 7 requirements for enactment of federal law and, therefore, do not pre-empt state law under the Supremacy Clause." *Wyeth,* 129 S. Ct. at 1207 (Thomas, J., concurring in the judgment). Instead, Justice Thomas contends, "[p]re-emption must turn on whether state law conflicts with the text of the relevant federal statute or with the federal regulations authorized by that text." *Id.* at 1208. However, the United States

(Continued on following page)

which the state law is in conflict, we examine the text of the relevant federal statute or regulation, the history of federal regulation in that subject area, and the agency's statements construing the regulation. *See Geier,* 529 U.S. at 875–77; *O'Hara v. Gen. Motors Corp.,* 508 F.3d 753, 759 (5th Cir. 2007) ("To determine the federal policy expressed in [the regulation], this Court looks to the text of the regulation, the history of [the agency's] regulation in this area, and [the agency's] statements construing [the regulation]."). A "specific, formal agency statement identifying conflict" is not necessary to conclude that a conflict exists, *Geier,* 529 U.S. at 884, and "[t]he weight we accord the agency's explanation of state law's impact on he federal scheme depends on its thoroughness, consistency, and persuasiveness," *Wyeth,* 129 S. Ct. at 1201. Courts must cautiously approach this interpretive task lest it become a "free wheeling judicial inquiry into whether a state [law] is in tension with federal objectives," which "undercut[s] the principle that it is Congress rather than the courts that pre-empts state law." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

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Supreme Court continues to uphold and apply obstacle preemption based on federal purpose, and we are bound to follow.

With this framework in mind, we turn to the relevant federal law that MCI asserts preempts the jury's verdict.

### A. The Federal Motor Vehicle Safety Standards

Congress passed the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act or Act), to reduce traffic accidents and their resulting injuries. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 33 (1983) (citing 15 U.S.C. § 1381 (1976) (current version at 49 U.S.C. § 30101)). Congress gave the Secretary of Transportation the authority to "prescribe motor vehicle safety standards. Each standard shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms." 49 U.S.C. § 30111(a). A motor vehicle safety standard is "a minimum standard for motor vehicle or motor vehicle equipment performance." *Id.* § 30102(a)(9). The Secretary of Transportation in turn delegated authority to create the safety standards to the Administrator of the National Highway Traffic Safety Administration (NHTSA). 49 C.F.R. § 1.50. Over the years, NHTSA has promulgated and modified the Federal Motor Vehicle Safety Standards (FMVSS), of which FMVSS 205 and 208 are at issue here. *See id.* §§ 571.205, .208.

### *1. FMVSS 208—Federal Regulation of Seatbelts*

In 1971, NHTSA issued FMVSS 208, which governed occupant crash protection and mandated seatbelts in motorcoaches for the driver only. *See id.* § 571.208, S4.4.1.[5] Two years later, NHTSA issued a Notice of Proposed Rule Making addressing passenger seating in buses. Bus Passenger Seating and Crash Protection, 38 Fed. Reg. 4776 (Feb. 22, 1973) (to be codified at 49 C.F.R. pt. 571). NHTSA designed the proposed rules to protect bus passengers by requiring higher, stronger, and softer seats that contained the passengers during a crash. *Id.* In response to suggestions that seatbelts should be required, NHTSA proposed adding them as an alternate restraint system, replete with a detection system that warned the passenger and the driver of unfastened seatbelts. *Id.* The proposed rules were to affect all buses.

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[5] For buses manufactured between January 1, 1972 and September 1, 1990, manufacturers actually had a choice even for the driver position. § 571.208, S4.4.1. They could design a "complete passenger protection system"—applicable only to the driver—that fulfilled certain crash requirements, *id.* S4.4.1.1, or they could install a seatbelt at the driver's position, *id.* S4.4.1.2. For buses weighing more than 10,000 pounds, like the bus here, manufacturers still have that choice, although the seatbelt option is more stringent. *See id.* S4.4.3.1. Since 1991, buses weighing less than 10,000 pounds are required to have seatbelts both for passengers and for the driver. *Id.* S4.4.3.2.

The following year, however, NHTSA withdrew the proposed standard for motorcoaches, determining that seating requirements for intercity and transit buses were not justified from a cost/benefit standpoint, and that seatbelt-usage surveys in intercity buses indicated few passengers would utilize seatbelts if provided. *See* School Bus Passenger Crash Protection, 39 Fed. Reg. 27,585 (July 30, 1974). The NHTSA did indicate that it would "propose standards in the future in this area if they are found desirable." *Id.*[6]

MCI draws our attention to several other events of note.[7] In 1992, the chief counsel for NHTSA wrote a

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[6] NHTSA did issue a new safety standard applicable only to school buses. *See* 49 C.F.R. § 571.222. The standard required a system of compartmentalization, which uses engineered seating arrangements to protect passengers during a crash. In 1983, NHTSA denied a petition for rulemaking that sought to require seatbelts in school buses. *See* Denial of Petition for Rulemaking, 48 Fed. Reg. 47,032 (Oct. 17, 1983).

[7] MCI asks the Court to take judicial notice of a 1977 study performed by the Indiana University at Bloomington Institute for Research in Public Safety. *See* STANSIFER ET AL., INST. FOR RESEARCH IN PUB. SAFETY, ANALYSIS FOR NEED FOR PASSENGER SAFETY BELT REQUIREMENTS IN INTERCITY BUSES (1977). The study was commissioned by the Federal Highway Administration, an agency within the Department of Transportation, and addressed the desirability of seatbelts in intercity buses. The report concluded that, among other things, the usage rate of seatbelts during the study period (1972–1976) was quite low and did not recommend a seatbelt requirement. While the report viewed seatbelts as desirable, it noted that the cost of installation could not be justified unless 80% of passengers properly

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letter responding to an inquiry about New York legislation that would require seatbelts in motorcoaches. Letter from Paul Jackson Rice, Chief Counsel, NHTSA to C.N. Littler, Coordinator, Regulatory Affairs, Motor Coach Indus. (Aug. 19, 1992). He concluded that FMVSS 208 would preempt the New York legislation regarding, as relevant here, intercity buses weighing more than 10,000 pounds. He stated

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wore the belts, while current rates of voluntary usage were then less than 20%.

While the report meets the requirements for judicial notice, *see* TEX. R. EVID. 201; *Office of Pub. Util. Counsel v. Pub. Util. Comm'n*, 878 S.W.2d 598, 600 (Tex. 1994) (per curiam) ("To be the proper subject of judicial notice, a fact must be capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Judicial notice is mandatory if requested by a party and [the court is] supplied with the necessary information." (quotation marks and citation omitted; alteration in original)), and we therefore take judicial notice of it, we fail to see the relevance of the report to NHTSA's regulatory function. NHTSA did not commission the report, and it did not change any federal safety standard in response to the report. Because only federal *law* can preempt contrary state law—which, in that context, is the domain of NHTSA through its rule-making process—this report does not affect our analysis of the preemption issues. *See Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 243 (3d Cir. 2008) ("[W]e must reiterate, lest the analysis become unmoored, that it is federal *law* which preempts contrary state law; nothing short of federal law can have that effect."). Even if NHTSA was aware of the report, NHTSA's non-action in response cannot reasonably be interpreted as more than preserving the status quo, which at that time meant no seatbelt requirement in motorcoaches like the one at issue here. NHTSA's inaction regarding this report cannot be interpreted as expressing a policy forbidding seatbelts, or even as a deliberate decision not to require seatbelts.

that "NHTSA expressly determined that there is not a safety need for safety belts or another type of occupant crash protection at these [passenger] seating positions." In so opining, NHTSA's counsel expressly cited and relied upon the 1974 notice in which NHTSA withdrew its proposed standards for motorcoach seating and seatbelt standards, the latter because of low usage rates.

In 2000, five years after the motorcoach here was built, NHTSA's acting administrator wrote a letter to the chairman of the National Transportation Safety Board (NTSB), which had repeatedly asked NHTSA to study the desirability of seatbelt standards for motorcoaches, noting that motorcoach crashes killed about five people per year. Letter from Rosalyn G. Millman, Acting Adm'r, NHTSA, to Jim Hall, Chairman, NTSB (Mar. 3, 2000). Even so, NHTSA said it would explore ways to study the crashworthiness of motorcoaches, including the feasibility and safety of seatbelts, in association with their manufacturers. Two years later, NHTSA announced a joint public meeting with its Canadian counterpart, Transport Canada, regarding the safety of motorcoaches. *See* Notice of Public Meeting on Motorcoach Safety Improvements, 67 Fed. Reg. 14,903 (Mar. 28, 2002). NHTSA invited comment on several proposed safety improvements, including limiting the size of glazing materials, introducing roof crush safety standards, requiring side curtain airbags, and requiring seatbelts. *Id.* at 14,904–05. Finally, in 2007, NHTSA issued a report recommending passenger seatbelts in

motorcoaches following research designed to determine the best performance standards for the seatbelt assembly and seat anchorages. *See* NHTSA, Docket 2007-28793, NHTSA'S APPROACH TO MOTORCOACH SAFETY 12–14. Based on this report, the Department of Transportation issued an action plan for motorcoach safety, in which it proposed to begin rulemaking to require seatbelts in motorcoaches. *See* U.S. DEP'T OF TRANSP., MOTORCOACH SAFETY ACTION PLAN 5 (2009). In August 2010, NHTSA followed up by publishing a Notice of Proposed Rulemaking (NPRM) that calls for three-point seatbelts for passenger seats in new motorcoaches. *See* Federal Motor Vehicle Safety Standards; Motorcoach Definition; Occupant Crash Protection, 75 Fed. Reg. 50,958 (Aug. 18, 2010) (to be codified at 49 C.F.R. pt. 571).[8]

*2. FMVSS 205—Federal Regulation of Glazing Materials*

FMVSS 205 "specifies requirements for glazing materials for use in motor vehicles." 49 C.F.R. § 571.205, S1. It is intended to "reduce injuries resulting from impact to glazing surfaces, to ensure a necessary degree of transparency in motor vehicle windows for driver visibility, and to minimize the

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[8] Hinton asks this Court to take judicial notice of both the report and the NPRM. MCI does not oppose either request, and we agree the standards of judicial notice are met. *See supra* note 7. Accordingly, we grant Hinton's request and take judicial notice of both the report and the NPRM.

possibility of occupants being thrown through the vehicle windows in collisions." *Id.* at S2. FMVSS 205 incorporates by reference the standards of the American National Standards Institute (ANSI), specifically the standard for Safety Glazing Materials Z26.1 [hereinafter ANSI/SAE Z26.1-1996].[9] *Id.* at S3.2(a). The parties do not dispute that the standard permitted several kinds of glazing materials, including, as relevant here, laminated or tempered glass,[10] and that MCI complied with the standard in

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[9] The ANSI/SAE standard in effect in 1995 was the American National Standard "Safety Code for Safety Glazing Materials for Glazing Motor Vehicles Operating on Land Highways" Z-26.1-1977, January 26, 1977, as supplemented by Z26.1a, July 3, 1980. *See* Glazing Materials Final Rule, 49 Fed. Reg. 6732, 6734 (Feb. 23, 1984) (formerly codified at 49 C.F.R. pt. 571). NHTSA adopted the 1996 version in 2003 to increase safety, to harmonize with foreign glazing standards, and to streamline and clarify the standard. *See* Glazing Materials Final Rule, 68 Fed. Reg. 43,964, 43,965 (July 25, 2003) (to be codified at 49 C.F.R. pt. 571). The difference between the older and newer versions is immaterial to this appeal given that both permitted laminated and tempered glass.

[10] Laminated glass means two or more pieces of sheet, plate, or float glass bonded together by an intervening layer or layers of plastic material. It will crack or breach under sufficient impact, but the pieces of glass tend to adhere to the plastic. If a hole is produced, the edges are likely to be less jagged than would be the case with ordinary annealed glass. ANSI/SAE Z26.1-1996 § 1.6. Tempered glass means a single piece of specially treated sheet, plate, or flat glass possessing mechanical strength substantially higher than annealed glass. When broken an [sic] any point, the entire piece breaks into small pieces that have relatively dull edges as compared to those of broken pieces of annealed glass. *Id.* § 1.21.

manufacturing the subject bus. *See* ANSI/SAE Z26.1-1996, T.1 (Items 1 & 2) (permitting laminated glass throughout a vehicle and tempered glass anywhere other than the windshield). The ANSI standard notes that "[o]ne safety glazing material may be superior for protection against one type of hazard, whereas another may be superior against another type. Since accident conditions are not standardized, no one type of safety glazing material can be shown to possess the maximum degree of safety under all conditions, against all conceivable hazards." *Id.* § 2.2.

In 1988, NHTSA proposed advanced glazing requirements for passenger vehicles and received numerous comments questioning, among other things, "whether this material would actually increase injuries to belted occupants due to head injury, neck loading, and lacerations." Withdrawal of Advance Notices of Proposed Rulemaking, 67 Fed. Reg. 41,365, 41,366 (June 18, 2002). In 1991, Congress mandated that NHTSA initiate rulemaking on rollover protection. *Id.* As part of this study, NHTSA focused on advanced glazing research as a possible method to reduce passenger ejections. *Id.* In 2001, Congress directed NHTSA to complete its study of glazing materials, and NHTSA issued a final report on the use of glazing materials to mitigate ejections. *Id.* at 41,367. Based on this report, NHTSA decided to terminate rulemaking on the issue of advance glazing, citing safety and cost concerns. *Id.* Noting the advent of other ejection mitigation systems (such as side air curtains) and the possibility that

advanced side glazing increased the risk of neck injuries in some cases, NHTSA determined that its time and resources were better spent on other projects that focused on developing "more comprehensive, performance-based test procedures." *Id.* In the 2007 report on motorcoaches, NHTSA emphasized the importance of roof strength because deformations following a crash compromise the window's ability to prevent ejections. *See* NHTSA'S APPROACH TO MOTORCOACH SAFETY, *supra*, at 20. For that reason, NHTSA concluded that "purs[u]ing the seat belt and roof strength approaches has greater potential for providing improved motorcoach occupant protection than continuing only the glazing/window retention strategy." *Id.* In sum, FMVSS 205 reflects NHTSA's conclusion that no one type of glazing material is superior in all situations, and it leaves to the manufacturers the decision of what kind of material—so long as it is one of the required kinds—to use in a particular setting.

### B. The Presumption Against Preemption

Before discussing whether preemption applies here, we must first address MCI's argument that the court of appeals improperly applied a presumption against preemption. MCI contends that *Geier* rejected any "special burden" beyond the application of ordinary preemption principles. The Plaintiffs counter that the presumption is rooted in federalism, not in *Geier*'s analysis of the interplay between the Safety Act's preemption and saving clauses. We agree in

principle with the Plaintiffs while recognizing that the exact contours of the presumption are far from clear. *See* Robert N. Weiner, *The Height of Presumption: Preemption and the Role of Courts*, 32 HAMLINE L. REV. 727, 727 (2009) ("Few aspects of Supreme Court jurisprudence are as contradictory and convoluted as the so-called 'presumption against preemption.'").

The United State [sic] Supreme Court noted a presumption against preemption in *Rice v. Santa Fe Elevator Corp.*, grounding it in the states' police power to regulate for the good of their citizens: "[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." 331 U.S. 218, 230 (1947); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."). The presumption is particularly strong when Congress legislates "in [a] field which the States have traditionally occupied." *Rice*, 331 U.S. at 230; *see also Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) ("In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest." (quotation marks omitted)). Citizens' health and safety are "'primarily and historically, . . . matter[s] of local concern,'" and thus states have "'great latitude'" to protect "'the

lives, limbs, health, comfort, and quiet of all persons.'" *Lohr*, 518 U.S. at 475 (quoting *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985) and *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)) (alterations in original).

Against this backdrop, the Supreme Court in *Geier* analyzed whether the Safety Act and FMVSS 208 preempted a common-law tort action in which the plaintiff claimed the automobile manufacturer was liable for failing to install airbags in a 1987 vehicle. 529 U.S. at 865. The Court first addressed the Safety Act's express preemption clause[11] and limited its application to state legislative and regulatory enactments, concluding that the Act's saving clause[12] exempted common-law tort actions from the

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[11] The 1987 version of the preemption clause read:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

Former 15 U.S.C. § 1392(d) (1988) (current version at 49 U.S.C. § 30103(b)).

[12] The 1987 version of the saving clause read: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." Former 15 U.S.C. 1397(k) (1988) (current version at 49 U.S.C. § 30103(e)).

preemption clause's scope. *Id.* at 867–68. The Court then rejected the argument that the saving clause foreclosed the operation of ordinary implied preemption principles, including obstacle preemption. *Id.* at 869. Further, the majority disagreed with the dissent's suggestion that the two clauses together created a "special burden" disfavoring preemption. *Compare id.* at 870–74, *with id.* at 898–99 (Stevens, J., dissenting). Instead, the majority considered the "language, purpose, and administrative workability" of the statutes and concluded that no reading of the two clauses favored jury-imposed safety standards over federal safety standards with which they actually conflict. *Id.* at 872–73. In such a case, the operation of ordinary preemption principles dictates that the state-law standard must give way.

We do not read *Geier*'s special-burden discussion to undermine the presumption against preemption. The former is rooted in two statutory provisions of the Safety Act, the latter in principles of federalism. Merely because the Safety Act's saving clause does not create a special burden disfavoring preemption does not eliminate the respective spheres of state and federal sovereignty, and the presumption simply affords deference to the states' long-standing rights to protect their citizens absent a clear directive from Congress. In the end, what the majority said in *Geier* does not negate the presumption against preemption.

What the majority did not say is another matter. MCI correctly notes the *Geier* majority's silence regarding the presumption. The *Geier* dissent noticed

as well and decried the majority's refusal to apply what the dissent considered to be an "'ordinary experience-proved principle[ ] of conflict pre-emption.'" *Id.* at 906–07 (Stevens, J., dissenting) (quoting *id.* at 874); *see also Altria Group, Inc. v. Good,* 129 S. Ct. 538, 558 (2008) (Thomas, J., dissenting) (noting in a discussion of *Riegel v. Medtronic, Inc.,* 552 U.S. 312 (2008), which involved express preemption, the effect of the majority's refusal to invoke the presumption: "Given the dissent's clear call for the use of the presumption against pre-emption, the Court's decision not to invoke it was necessarily a rejection of any role for the presumption in construing the statute."). Commentators likewise concluded that the *Geier* majority upended the normal presumption against preemption.[13] In view of the Supreme Court's recent statements on the issue, however, we cannot agree.

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[13] *See, e.g.,* Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption,* 69 BROOK. L. REV. 1313, 1319 (2004) ("The only way to make sense of [*Geier*] is to see it as putting a presumption in favor of preemption."); Susan Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did* Geier v. American Honda Motor Co. *Eradicate the Presumption Against Preemption?,* 17 BYU J. PUB. L. 1, 2 (2002) ("The five-member majority [in *Geier*] accomplished its apparent goal of preemption in the case by abandoning the long-standing presumption against preemption and the concomitant requirement that Congress's intent to preempt be clear, and it thereby removed any protections the presumption provided to federalism principles, state tort law, and Congress's own preemptive intentions." (footnotes omitted)).

In *Wyeth v. Levine,* the Court considered whether federal law preempted, under the actual conflict theory, a Vermont jury's finding that the manufacturer of the drug Phenergan failed to adequately warn of the risks associated with directly injecting the drug into a patient's vein. 129 S. Ct. at 1190–91. The Court, relying on *Lohr,* stated the classic formulation of the presumption against preemption and rejected the dissent's contention that the presumption should not apply to claims of implied conflict preemption. *Id.* at 1194–95 & n.3 (citing *Lohr,* 518 U.S. at 485 and *Rice,* 331 U.S. at 230). According to the dissent, the Court had never—prior to *Wyeth*—definitively applied the presumption in the actual-conflict context. *Id.* at 1228–29 & n.14 (Alito, J., dissenting). From the majority's language in *Wyeth,* we fail to see how the presumption does not apply to all preemption cases, including implied conflict cases. *Id.* at 1194–95 & n.3 ("For its part, the dissent argues that the presumption against pre-emption should not apply to claims of implied conflict preemption at all, but this Court has long held to the contrary." (citation omitted)); *see also Altria Group,* 129 S. Ct. at 543 ("When addressing questions of express or implied pre-emption, we begin our analysis with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (quotation marks omitted; alteration in original)).

That *Geier* addressed the Safety Act and *Wyeth* a different statute is, contrary to MCI's position, irrelevant.[14] Accordingly, we apply the presumption that Congress did not intend to preempt contrary state law absent evidence that such a result was Congress's clear and manifest purpose.

### C. Seatbelts and Federal Preemption

Given that no federal safety standard even discusses passenger seatbelts in motorcoaches, MCI's preemption claim is predicated on regulatory silence. That is, MCI argues that NHTSA's failure to regulate was deliberate and has the same preemptive force as a regulation forbidding passenger seatbelts. While we agree that regulatory silence can preempt state law in rare occasions, we do not agree that NHTSA's decision not to require seatbelts in motorcoaches is such an occasion.

The Supreme Court has stated that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate."

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[14] We have applied the presumption against preemption since *Geier*, even when considering the preemptive effect of the Safety Act and the safety standards promulgated thereunder. *See Great Dane Trailers*, 52 S.W.3d at 743; *see also Graber v. Fuqua*, 279 S.W.3d 608, 611–12 (Tex. 2009) (applying the presumption when deciding if the federal bankruptcy regime preempted a state malicious prosecution claim).

*Sprietsma v. Mercury Marine*, 537 U.S. 51, 66 (2002) (quoting *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (quotation marks omitted)). In applying this standard, the Court focused on the agency's explanation for its decision not to regulate. *See id.* at 66–67. Two cases in which the Court considered the preemptive effect of an agency's decision not to regulate illustrate the rule's application.

In *Sprietsma*, the Supreme Court considered whether a claim that a motor boat should have been equipped with a propeller guard was preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301–4311 (Boating Act). Like the Safety Act, the Boating Act contains both an express preemption clause and a saving clause, which the Court interpreted the same way—the preemption clause only affected state legislation and regulations, and the saving clause preserved common-law tort actions. 537 U.S. at 63. Finding no express preemption, the Court unanimously rejected the claim that the tort action conflicted with the federal regulatory scheme. *Id.* at 65. Addressing the boat manufacturer's argument that the "Coast Guard's decision not to adopt a regulation requiring propeller guards on motorboats" had preemptive force, the Court responded: "It is quite wrong to view that decision as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation." *Id.* Rather, that decision "is fully consistent with an intent to preserve state regulatory authority

pending the adoption of specific federal standards." *Id.* The Coast Guard decided not [sic] require propeller guards because doing so was not technically feasible, the cost of retrofitting boats was substantial, and accident data did not support such regulation; as such, the high standard for justifying regulations was not met. *Id.* at 66. Given this explanation, the Court found nothing in the Coast Guard's statement "inconsistent with a tort verdict premised on a jury's finding that some type of propeller guard should have been installed." *Id.* at 67.

Similarly, in *Freightliner Corp. v. Myrick*, the Supreme Court refused to give preemptive force to regulatory silence: "We hold that the absence of a federal standard cannot implicitly extinguish state common law." 514 U.S. 280, 282 (1995). The plaintiffs claimed the tractor-trailers that crashed into their vehicles should have been equipped with antilock braking systems (ABS). The Safety Act and NHTSA regulations did not require such braking systems,[15]

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[15] NHTSA had promulgated a safety standard requiring trucks using air brakes to stop within certain distances. *See Myrick*, 514 U.S. at 284 (citing Air Brake Systems; Trucks, Buses, and Trailers, 36 Fed. Reg. 3817 (Feb. 27, 1971) (to be codified at 49 C.F.R. pt. 571)). Manufacturers notified NHTSA that the distances could not be achieved without using ABS devices and that these devices were unreliable. *Id.* at 285. When NHTSA disagreed, the manufacturers brought suit and succeeded in having the standard suspended until NHTSA compiled sufficient evidence that ABS devices did not create a greater danger. *Id.* As of the Supreme Court's writing, the standard was still suspended. *Id.* at 285–86.

but the manufacturer argued "that the absence of regulation itself constitutes regulation." *Id.* at 286. The Court distinguished an earlier case in which it had stated that the failure of federal officials "affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Id.* at 286 (quoting *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 178 (1978) (quotation marks omitted)). In *Ray*, Congress had intended to consolidate all regulatory power in the federal government, whereas in *Myrick*, "NHTSA did not decide that the minimum, objective safety standard required by [the Safety Act] should be the absence of all standards, both federal and state." *Id.* at 286–87.

From these cases, it follows that an agency's mere decision to leave an area unregulated is not enough to preempt state law. Instead, the agency must, consistent with the authority delegated to it by Congress, affirmatively indicate that no regulation is appropriate. That is, the agency must state that not only will it leave the area unregulated, it will not allow any regulation in that area as a matter of policy. Unless the agency takes this "further step" to disallow state regulation, its decision not to regulate has no preemptive force. *Sprietsma*, 537 U.S. at 67.

When looking at NHTSA's comments regarding passenger seatbelts in motorcoaches, we do not find any expression of intent to forbid state regulation. NHTSA proposed a requirement for passenger seatbelts in 1973 along with modified seating standards

designed to contain passengers during a crash. *See* 38 Fed. Reg. 4776 (Feb. 22, 1973). The following year NHTSA continued to advance such seating standards in school buses, but decided to withdraw the proposed standards for motorcoaches and transit buses: "The NHTSA has in fact determined that seating requirements for intercity and transit buses are not justified, based on benefit/cost studies of present seating performance in these buses. . . . Seat belt usage surveys in intercity buses also indicate that a very low percentage of passengers would utilize seat belts if they were provided. . . . The NHTSA will, of course, propose standards in the future in this area if they are found desirable." School Bus Passenger Crash Protection, 39 Fed. Reg. 27,585 (July 30, 1974). This explanation indicates that NHTSA simply determined that the cost of installing seatbelts was not justified given the low usage rates.[16] Nothing in these few sentences evidences an intent to prevent a state jury from concluding that seatbelts in a particular setting were appropriate. The similarity of NHTSA's decision to the Coast Guard's decision in *Sprietsma* not to regulate is compelling. Like NHTSA, the Coast Guard had

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[16] To the extent it is relevant at all, the 1977 study commissioned by the Federal Highway Administration corroborates this conclusion. *See supra* note 7. The report gives no indication that NHTSA affirmatively opposed any state law requiring seatbelts in motorcoaches. To be sure, seatbelts are not, according to the study, an unmitigated benefit to the passengers. The kind of accident, such as a side collision, could well neutralize the seatbelts' protection.

considered and rejected a proposed standard intended to increase user safety on the grounds that it was not justified. *See* 537 U.S. at 66. Both agencies engaged in cost/benefit analyses and concluded that the costs outweighed the benefits based on the relevant data. In *Sprietsma*, the Supreme Court found no preemption under these circumstances. On these facts, we reach the same conclusion. Because we find no clear and manifest statement in the 1974 withdrawal of the proposed regulations—NHTSA's final, official statement on the subject before the motorcoach here was manufactured—that NHTSA intended as a matter of policy to forbid any state requirement of passenger seatbelts in motorcoaches, we must conclude that the jury's verdict in this case is not preempted by federal law.[17]

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[17] We recognize that several other courts have reached the opposite conclusion. *See Lake v. Memphis Landsmen, L.L.C.*, No. W2009-0526-COA-R3-CV, 2010 WL 891867, at *9–*11 (Tenn. Ct. App. Mar. 15, 2010); *Doomes v. Best Transit Corp.*, 890 N.Y.S.2d 526, 526 (N.Y. App. Div. Dec. 10, 2009); *Surles v. Greyhound Lines, Inc.*, No. 4:01-CV-00107, 2005 WL 1703153, at *5–*6 (E.D. Tenn. July 20, 2005). We are not persuaded by these opinions, particularly as to their reliance on the 1992 letter from NHTSA's chief counsel. We further note that while Congress may have intended to create uniform standards for the motor vehicle industry, it also allowed—via the saving clause—juries to hold manufacturers liable for inadequate safety measures. *See Wyeth*, 129 S. Ct. at 1200 ("The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.") (quoting *Bonito*

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Nor does any later evidence change the analysis. The letter of NHTSA's chief counsel in 1992 is unremarkable insofar as it concludes that the Safety Act would preempt nonidentical New York legislation—the Act's express preemption clause compels such a conclusion. *See* 49 U.S.C. § 30103(b)(1). But then NHTSA's counsel opined that the agency had "expressly determined that there is not a safety need for safety belts or another type of occupant crash protection at these seating positions" and cited the 1974 withdrawal of proposed regulation. Letter from Paul Jackson Rice, Chief Counsel, NHTSA to C.N. Littler, Coordinator, Regulatory Affairs, Motor Coach Indus. (Aug. 19, 1992). We refuse to give preemptive force to this sentence for two reasons. First, there is nothing in this statement that indicates opposition to seatbelts and an affirmative desire to forbid their use. Second, to hold that NHTSA's decision not to regulate preempts state law based on a letter written eighteen years after the official decision illustrates the dangers of obstacle preemption grounded in agency musings. A letter, even by NHTSA's chief counsel, is not federal law, nor it is [sic] particularly persuasive regarding NHTSA's intent in the 1974 withdrawal. The text of the withdrawal notice is not technical or complex and speaks for itself; a later interpretation of that text is persuasive only to the extent it is correct. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (giving

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*Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–67 (1989) (alteration in original)).

weight to an agency's "rulings, interpretations and opinions" depending "upon the thoroughness evident in [their] consideration, the validity of [their] reasoning, [their] consistency with earlier and later pronouncements, and all those factors which give [them] power to persuade, if lacking power to control"); *cf. Wyeth*, 129 S. Ct. at 1201 (giving "some weight" to an agency's views on the impact of tort law on federal objectives when the subject matter is technical and the relevant history complex). We will not overturn a jury's verdict on such tenuous grounds.

All of NHTSA's later statements, from letters to notices of public meetings to reports and action plans, demonstrate the agency's increased willingness to reconsider its 1974 decision to leave motorcoaches essentially unregulated. These events culminated in the initiation of rulemaking for the installation of passenger seatbelts on motorcoaches. The jury anticipated NHTSA's future actions, and we find no conflict between its verdict and the federal safety standards.

MCI argues that the history of NHTSA's motorcoach regulation points in a very different direction. It contends that NHTSA chose an alternate method of passenger protection, compartmentalization, *see supra* note 6, and required seatbelts only for the driver. Further, MCI asserts that three different cases are more relevant than *Sprietsma* or *Myrick*: *Geier*, *Carden v. Gen. Motors Corp.*, 509 F.3d 227 (5th Cir. 2007), and *BIC Pen Corp. v. Carter*, 251 S.W.3d 500 (Tex. 2008). In these latter cases, MCI argues, the agencies carefully weighed competing interests and

chose not to require safety devices the plaintiffs wanted. So too here, MCI continues, NHTSA evaluated the seating designs and desirability of seatbelts in motorcoaches and purposefully chose a limited scope of regulation.

We disagree with MCI's interpretation of NHTSA's actions. In particular, there is nothing in the regulatory history of motorcoaches to suggest that NHTSA intended to rely on seating design rather than seatbelts and promulgated standards to that effect. As discussed above, the 1973 notice proposed changing seat design to better protect passengers and also to incorporate seatbelts as an alternative restraint system. In 1974, NHTSA withdrew both proposals, finding that the cost of the methods did not justify their benefits. NHTSA did issue seating standards for school buses, *see* 49 C.F.R. § 571.222, but not for motorcoaches. Thus, it is inaccurate to suggest that NHTSA chose an alternate method to protect passengers; instead, NHTSA chose not to regulate seating design or seatbelts in motorcoaches, a decision that does not have preemptive force for the reasons explained above.

Nor do we find *Geier*, *Carden*, or *BIC Pen* more analogous to the present situation. In *Geier*, the Supreme Court considered whether FMVSS 208 preempted a claim that a 1987 vehicle should have had airbags. 529 U.S. at 865. FMVSS 208, as in effect at the time, "deliberately sought variety—a mix of several different passive restraint systems." *Id.* at 878. NHTSA also chose to gradually phase in the

requirements for passive restraints and made them conditional; because seatbelts provided the same or greater benefit at a lower cost, the passive-restraint standard would be rescinded if two-thirds of the states mandated seatbelt use within a certain period of time. *Id.* at 879–80. The reasons for this mix of restraints and gradual phase-in over time reflected NHTSA's experience and considerations of cost and public acceptance. Even though seatbelts provided the best protection in the event of a crash, most of the public did not wear them at the time. *Id.* at 877. While passive restraints such as airbags could provide some of that lost protection, they created problems of their own (e.g., harm to children), cost more than seatbelts, and were viewed with suspicion by the public. *Id.* at 877–78. Thus, rather than simply mandate airbags—a tactic that had failed when NHTSA required seatbelt buzzers and ignition interlocks[18]—NHTSA decided that public "safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." *Id.* at 881 (quotation marks omitted). Because the plaintiffs' suit required a single standard mandating the installation of airbags, it "presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.*

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[18] An ignition interlock "force[s] occupants to buckle up by preventing the ignition otherwise from turning on." *Id.* at 876. Public displeasure at these methods resulted in Congress passing a law disallowing DOT from requiring them. *Id.*

Because the suit required all of the manufacturer's cars sold in the District of Columbia to be equipped with airbags, when FMVSS 208 only required ten percent of the manufacturer's nationwide fleet to be so equipped, it "stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed." *Id.* Accordingly, the rule of law advocated by the plaintiffs was preempted by federal law. *Id.*

In *Carden*, the Fifth Circuit considered whether FMVSS 208 preempted the plaintiffs' claim that a car manufacturer should have installed a lap/shoulder seatbelt rather than a lap belt alone in the rear center seat of a 1999 Pontiac Grand Am. 509 F.3d at 229. Finding *Geier* directly on point, the court reviewed the history of FMVSS 208 and concluded that NHTSA deliberately gave manufacturers the choice of which kind of seatbelt to install based on specific policy reasons. *Id.* at 230–31. These reasons included the technical difficulties associated with installing a shoulder belt in the rear center position, and the greater cost of doing so even when the expected safety benefit was minimal given the low occupancy rate in that seat. *Id.* at 231. The Fifth Circuit then distinguished *Sprietsma* and its analysis of non-regulation by noting the presence of explicit regulation and the choice given therein. *Id.* at 232.

Finally, in *BIC Pen*, this Court considered whether federal law preempted a design defect claim regarding a BIC lighter. 251 S.W.3d at 503. We reviewed the certification process lighters must undergo at the

direction of the Consumer Product Safety Commission, the regulatory agency charged with developing safety standards for consumer products. *Id.* The Commission adopted regulations that require lighters to successfully resist operation by eighty-five percent of a child-test panel. *Id.* This number was chosen based on numerous factors, "including child resistence, overall safety, the realities of manufacturing, the variability and randomness of child testing, the product's utility, and the importance of customer acceptance." *Id.* at 507 (citing 16 C.F.R. § 1210.5(c)). The Commission was particularly concerned that lighters not be too difficult to operate or adults would forgo their use and resort to non-child-resistant lighters or matches, which posed even greater dangers to children. *Id.* Because the Commission weighed these factors and struck a delicate balance between them, we concluded that "imposing a common law rule that would impose liability above the federal standard is contrary to the Commission's plan and conflicts with federal law." *Id.* Accordingly, we held that the design defect claim was preempted. *Id.* at 509.

MCI argues these cases illustrate the preemptive effect of an agency's regulatory action following a careful analysis of various, and often competing, considerations of safety and cost. But MCI misses a telling distinction between these cases and the present one. In *Geier, Carden,* and *BIC Pen,* the agencies actually *issued* regulations. These regulations balanced competing considerations, as MCI notes, but in

each case the courts considered the preemptive effect of a *regulation.* When an agency issues regulations, a federal law exists with which a state law can conflict. But when the agency chooses not to regulate, there is no preemptive federal law absent a clear and manifest indication of the agency's intent to forbid all regulation. NHTSA has not taken that further step regarding passenger seatbelts in motorcoaches. In this respect, the present case is more akin to *Sprietsma* and *Myrick,* in which the Supreme Court found no preemptive intent in the agencies' non-action.

Regulatory silence will not preempt a state law absent a clear and manifest statement of intent to forbid all regulation in that area. Applying this standard to NHTSA's decision not to require passenger seatbelts in motorcoaches, we find nothing in the regulatory history or agency statements indicative of such intent. In this lacuna of regulation, the jury's finding that MCI should have installed seatbelts on its motorcoach does not conflict with any federal law and is not preempted.

### D. Glazing Materials and Federal Preemption[19]

We next consider the effect of FMVSS 205 on the Plaintiffs' claim that the motorcoach should have had laminated-glass windows. Unlike the seatbelt claim, here NHTSA issued an actual federal safety standard giving manufacturers a choice of glazing materials, including laminated and tempered glass. The jury determined that MCI should have used laminated glass rather than tempered glass and that this defect caused some of the Plaintiffs' injuries. The parties agree that FMVSS 205 gives a choice but disagree on its significance. Thus, we must decide if an agency's deliberate decision to give manufacturers a choice between several different materials, none of which is superior to the others in all circumstances, preempts a jury's conclusion that another of the required types should have been used. We conclude that it does not.

The Safety Act defines the federal motor vehicle safety standards as "minimum standard[s]." 49

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[19] The jury found that the lack of seatbelts caused the injuries of all the Plaintiffs. Thus, our conclusion that the seatbelt claim is not preempted is sufficient to uphold the jury's verdict. Even so, we discuss the preemptive effect of FMVSS 205 because, in light of the remand for a new trial, the issue of glazing materials will feature prominently on retrial. Accordingly, we address it to provide guidance to the trial court. *See Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 81 (Tex. 1997) ("Although resolution of this issue is not essential to our disposition of this case, we address it to provide the trial court with guidance in the retrial . . . .").

U.S.C. § 30102(a)(9). And state regulation of vehicle safety through common-law tort actions is expressly allowed: "[The Safety Act's saving clause] preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." *Geier*, 529 U.S. at 870; *see also* 49 U.S.C. § 30103(e). Of course, a tort action that seeks to impose a requirement forbidden by a federal standard, or that forbids what the standard requires, is preempted due to the actual conflict. Likewise, a tort action that presents an obstacle to the federal purpose is preempted—*Geier* is clear that ordinary preemption principles apply. 529 U.S. at 874. But we must be mindful that Congress generally intended the federal safety standards to set a minimum standard for performance and allowed juries to determine in particular cases if the vehicle manufacturer should have done more.

The text of FMVSS 205 states its three-fold purpose—to reduce injuries resulting from impact to glazing surfaces, to provide driver visibility, and to minimize ejections—and incorporates by reference the standards of ANSI/SAE Z26.1-1996. 49 C.F.R. § 571.205, S2, S3.2(a). The ANSI standard delineates the testing requirements for the various glazing materials and allows the use of either laminated glass or tempered glass in vehicle windows other than the windshield, which must have laminated glass. *See* ANSI/SAE Z26.1-1996, T.1 (Items 1 & 2). Nothing in the text of FMVSS 205 indicates that it is anything other than a minimum materials standard. In the

absence of the standard, manufacturers could use any material allowed by state law; the standard simply limits the range of available choices.

MCI argues that the choice of glazing materials is enough to preempt a jury's finding that a different material should have been used. To be clear, the jury did not find that MCI should have used a glazing material not permitted by FMVSS 205, only that MCI should have used a different glazing material allowed by the standard. Even such a finding, MCI contends, violates the purpose of FMVSS 205 and the policy-motivated decisions NHTSA made in adopting it. Central to MCI's argument is its interpretation of *Geier* and that opinion's analysis of FMVSS 208. MCI claims that *Geier* and lower courts following it have applied FMVSS 208 to preempt tort actions that sought to hold manufacturers liable for not choosing a different safety measure allowed by the standard.

Lower courts have, in fact, interpreted *Geier* in this fashion,[20] but we believe these courts have read

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[20] *See, e.g.*, *Carden*, 509 F.3d at 230–31 ("*Geier*, thus, compels the conclusion that a state tort suit that would foreclose a safety option intentionally left to vehicle manufacturers by Federal Motor Vehicle Safety Standards is preempted."); *Griffith v. Gen. Motors Corp.*, 303 F.3d 1276, 1282 (11th Cir. 2002) ("[U]nder *Geier*, when a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suit that depends on foreclosing one or more of those options is preempted."); *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 383 (7th Cir. 2000) ("[W]hen a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety

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*Geier* too broadly. The Supreme Court in *Geier* did not condemn a common-law rule merely because it

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device options, a state suit that depends on foreclosing one or more of those options is preempted."); *Carrasquilla v. Mazda Motor Corp.*, 166 F. Supp. 2d 169, 176 (M.D. Pa. 2001) (concluding that plaintiffs' claim was "attacking one of the specifically permitted passive restraint options [under FMVSS 208]" (alteration in original)); *Hernandez-Gomez v. Volkswagen of Am., Inc.*, 32 P.3d 424, 428–29 (Ariz. Ct. App. 2001) (concluding that plaintiff's state tort claim is preempted by FMVSS 208); *Williamson v. Mazda Motor Co. of Am., Inc.*, 84 Cal. Rptr. 3d 545, 556 (Cal. Ct. App. 2008) (concluding that plaintiffs' claim related to lap-only seatbelt is barred by FMVSS 208), *cert. granted*, 77 U.S.L.W. 3611 (U.S. May 24, 2010) (No. 08-1314); *Roland v. Gen. Motors Corp.*, 881 N.E.2d 722, 728–29 (Ind. Ct. App. 2008) (holding that plaintiffs' common-law tort action is preempted "on the narrow grounds" that it conflicts with FMVSS 208, but refusing to join other courts that find preemption on "broader grounds" when any regulation affords a choice to manufacturers); *Osman v. Ford Motor Co.*, 833 N.E.2d 1011, 1021 (Ind. Ct. App. 2005) (holding that claims asserted in connection with automobile's passive-restraint system were preempted by FMVSS 208); *Heinricher v. Volvo Car Corp.*, 809 N.E.2d 1094, 1097–98 (Mass. App. Ct. 2004) (concluding that plaintiffs' state common law claims are preempted by FMVSS 208); *Morgan v. Ford Motor Co.*, 680 S.E.2d 77, 94–95 (W. Va. 2009) ("We therefore find that because the NHTSA gave manufacturers the option to choose to install either tempered glass or laminated glass in side windows of vehicles in FMVSS 205, permitting the plaintiff to proceed with a state tort action would foreclose that choice and would interfere with federal policy."). *But see O'Hara v. Gen. Motors Corp.*, 508 F.3d 753, 759 (5th Cir. 2007) ("When a federal safety standard deliberately leaves manufacturers with a choice among designated design options *in order to further a federal policy*, a common law rule which would force manufacturers to adopt a particular design option is preempted." (emphasis added)).

foreclosed a choice under the relevant safety standard. Rather, the Court emphasized the purpose of the choice: "FMVSS 208 embodies the Secretary's policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." 529 U.S. at 881 (quotation marks omitted). That is, the *choice itself* furthered the overall goal of safety, allowing manufacturers to experiment with different options and to build the public's confidence in the new technologies. The specific reasons for this mix of safety options phased-in over time is discussed above, and there is no doubt that *Geier*'s choice-with-a-purpose reasoning is securely grounded in FMVSS 208 and its particular history. To the extent that other courts have interpreted *Geier* in the context of FMVSS 208 and NHTSA's decision to phase-in a mix of passive restraint systems, we agree they are correct. But when *Geier*'s reasoning is oversimplified to find preemption based on a choice between two safety options and then exported to other safety standards where the unique text and history of FMVSS 208's passive restraint requirements are not relevant, we must respectfully disagree.[21]

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[21] Hinton asks this Court to take judicial notice of the Solicitor General's amicus brief filed in *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314, pending before the United States Supreme Court. We grant Hinton's request. *See supra* note 7. In *Williamson*, the Court granted certiorari to consider whether FMVSS 208 preempts a claim that a 1993 Mazda MPV van

(Continued on following page)

Given our interpretation of *Geier*, we turn to MCI's argument that FMVSS 205 represents NHTSA's deliberate decision to give manufacturers a choice of safety options. That is, MCI seems to contend that NHTSA made a *Geier*-like policy decision to encourage a range of glazing choices. We do not agree. As noted, FMVSS 205 then and now gives manufacturers a choice of materials and recognizes that no one type is superior in all circumstances. *See* 49 C.F.R. § 571.205, S3.2(a); ANSI/SAE Z26.1-1996 § 2.2. In the final rule adopting the new ANSI/SAE standards, NHTSA did not state a positive desire to preserve the use of tempered glass in windows by forbidding contrary state regulation. *See* 68 Fed. Reg. 43,964. Rather, NHTSA declined to continue rulemaking regarding advanced glazing materials after completing a ten-year study of the subject because

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should have been equipped with a lap/shoulder belt in the rear middle seat rather than a lap-only belt. *See* 130 S. Ct. 3348 (May 24, 2010) (order granting certiorari); *see also* Brief for the United States as Amicus Curiae at 5, 21, *Williamson v. Mazda Motor of Am., Inc.*, No. 08-1314 (U.S. Apr. 23, 2010). The Solicitor General, joined by DOT and NHTSA, rejected the broad reading of *Geier*: "The government's briefs to this Court have consistently explained that NHTSA's decision to allow options, standing alone, does not compel a finding of preemption." Brief for the United States as Amicus Curiae at 18, *Williamson v. Mazda Motor of Am., Inc.*, No. 08-1314. Instead, more is needed: "But without more (such as the emphasis on diversity of solutions discussed in *Geier*), the States are not foreclosed from concluding, through a duty of care applied in common-law tort actions, that one option is superior to the others." *Id.* at 19.

other safety measures, such as side air curtains, also helped to mitigate ejections and NHTSA needed to devote its resources to developing standards for them. *See* 67 Fed. Reg. at 41,366. NHTSA also cited the costs associated with redesigning vehicles to accept advanced glazing materials and noted that use of these materials may increase the risk of neck injuries. *Id.*

In short, NHTSA extensively studied the issue and did not change the safety standard, which still allows manufacturers to choose among several types of glazing materials. FMVSS 205 is unlike FMVSS 208 and its carefully constructed timetable and mix of safety options. *Compare* 49 Fed. Reg. 6732, *and* 68 Fed. Reg. 43,964, *with* Occupant Crash Protection Final Rule, 49 Fed. Reg. 28,962 (July 17, 1984) (to be codified at 49 C.F.R. pt. 571). Neither set of standards is, as MCI argues, a "choice among the best available alternatives." Rather, the former merely narrows the range of manufacturers' choice of glazing materials from potentially unlimited to a short list. The latter emphasizes the choice among options as an important and integral part of the overall safety scheme. We find nothing in the standard's text, history, or NHTSA's comments to indicate that FMVSS 205 is anything other than a minimum standard. As a minimum standard, FMVSS 205 does not preempt

the jury's finding that MCI should have used laminated glass in the motorcoach's windows.[22]

We are not the first court to examine the preemptive effect of FMVSS 205. In *O'Hara v. General Motors Corp.*, the Fifth Circuit addressed the same issue in the context of a sport utility vehicle. 508 F.3d 753, 755 (5th Cir. 2007). The plaintiffs claimed that General Motors should have used advanced glazing materials in the side windows of a 2004 Chevrolet Tahoe instead of tempered glass. *Id.* The Fifth Circuit considered the text and history of FMVSS 205 as well as NHTSA interpretations of the standard and general comments on the subject matter of advanced glazing materials. *See id.* at 759–63. It concluded that FMVSS 205 differs from FMVSS 208 both in text and purpose—specifically that the relevant "factors" of the latter, "detailed implementation timelines, full vehicle testing procedures and 'options' language," that supported preemption—were "conspicuously absent from FMVSS 205." *Id.* at 760. The court found that NHTSA commentary on FMVSS 205 supported "the conclusion that it is a minimum safety standard." *Id.* at 761. Interestingly, the court also considered NHTSA's decision to terminate rulemaking on

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[22] On this issue, we agree with the Fifth Circuit in *O'Hara*, discussed below, that the presumption against preemption is unnecessary for resolution of the glazing materials claim because the jury's verdict does not actually conflict with FMVSS 205. *See* 508 F.3d at 759 n.4.

advanced glazing materials and analogized that choice to the Coast Guard's non-action in *Sprietsma*:

> We find the parallels between NHTSA's Withdrawal of Rulemaking and the Coast Guard's statements in *Sprietsma* to be compelling. NHTSA's 2002 Notice of Withdrawal focused on the need to develop experimental standards for new rollover accident technologies. It did not reject advanced glazing as unsafe (indeed, FMVSS 205 continued to require advanced glazing in vehicle windshields). Like the Coast Guard, the NHTSA Notice of Withdrawal cited cost concerns and minor safety issues to justify the agency's change in course. And also like the Coast Guard, NHTSA has continued to study advanced glazing as part of its rollover protection program. NHTSA's Notice of Withdrawal "does not convey an authoritative message of a federal policy against" advanced glazing in side windows.

*Id.* at 762–63.[23] Finding FMVSS 205 to be a minimum safety standard, the court held that the plaintiffs' negligence and strict liability claims were not preempted. *Id.* at 763.

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[23] We do not understand MCI to argue that because NHTSA chose not to change the glazing options in FMVSS 205 after ten years of study, we should interpret this non-action as an affirmative policy decision against advanced glazing materials in side windows. Even if it had, we find persuasive *O'Hara*'s comparison to *Sprietsma*.

The Supreme Court of West Virginia also considered whether FMVSS 205 preempted a claim that a vehicle manufacturer should have used advanced glazing materials rather than tempered glass in the side window of a sport utility vehicle. *Morgan v. Ford Motor Co.*, 680 S.E.2d 77, 81 (W. Va. 2009). The court examined *Geier*, *O'Hara*, and *Wyeth* at some length, *see id.* at 88–93, and specifically rejected the interpretation of *Geier* that we adopt, instead holding that a regulation giving a choice between different materials preempts a tort action premised on the superiority of one option, *id.* at 94–95. The court reasoned that "because the NHTSA made a public policy decision to not mandate advanced glazing in side windows because of safety concerns that advanced glazing has a slightly increased risk of neck injuries," it was compelled to find *Geier* directly applicable. *Id.* at 94.[24]

As our analysis makes plain, we agree with *O'Hara*. The *Morgan* court errs by concluding that merely because NHTSA chose not to require something for policy reasons, states may not do so as well. As discussed above, the rule in *Sprietsma* regarding the preemptive force of regulatory non-action is not so broad, particularly when NHTSA still permits

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[24] The Tennessee Court of Appeals followed *Morgan*'s analysis when confronted with the issue. *See Lake*, 2010 WL 891867, at *6–*9. The *Lake* court identified the split between *O'Hara* and *Morgan* and agreed with the latter. The South Carolina Supreme Court also followed *Morgan*'s and *Lake*'s analysis on this issue. *Priester v. Cromer*, 697 S.E.2d 567, 571 (S.C. 2010).

manufacturers to choose what it would not require. There is no evidence that NHTSA intended to disallow states from requiring the use of advanced glazing materials in side windows. Nor do we agree with the *Morgan* court's broad interpretation of *Geier*, that preemption is mandated whenever an agency makes a considered decision to preserve the status quo and its range of choices. As the Solicitor General has said: "Manufacturers always have the 'option' of exceeding a minimum safety standard when NHTSA has decided not to mandate a more stringent alternative because of considerations of cost or feasibility—as NHTSA did in this case and, indeed, often does in considering regulatory alternatives. But if such an 'option' alone were enough to trigger federal preemption under *Geier*, the Safety Act's savings clause would be greatly undermined." Brief for the United States as Amicus Curiae at 15, *Williamson v. Mazda Motor of Am., Inc.*, No. 08-1314. We agree. Attributing preemptive intent to every deliberate agency decision runs afoul of Congress's choice to define the safety standards as minimum standards and its clear decision to allow juries a place in developing common-law rules that exceed the federally defined floor.

We hold that FMVSS 205 is a minimum standard that merely limits the possible glazing materials a manufacturer may choose for incorporation in its vehicles. As such, the jury's finding that MCI should have used a different glazing material in the motorcoach here presents no obstacle to the accomplishment and execution of a federal policy. Thus, we hold

that the jury's verdict in favor of the Plaintiffs is not preempted by federal law.

## III. Settling Persons

We finally consider whether Central Texas and the bus driver[25] are settling persons under Chapter 33 of the Texas Civil Practice and Remedies Code. The 1995 version of Chapter 33 provided a proportionate responsibility framework for apportioning percentages of responsibility in the calculation of damages.[26] At that time, section 33.003 required a trier of fact to determine the percentage of responsibility for each claimant, each defendant, each settling person, and each responsible third party who had been properly joined. TEX. CIV. PRAC. & REM. CODE § 33.003.[27] Section 33.013 provided, with some exceptions, that a defendant was only liable for the percentage of

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[25] Unless otherwise specified, we will refer to Central Texas and the bus driver collectively as "Central Texas" in this section of the opinion.

[26] The 1995 version of Chapter 33 applies to this case because the Plaintiffs filed suit on June 26, 2003. Chapter 33 was amended on June 2, 2003, but those amendments apply only to a cause of action filed on or after July 1, 2003. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 4.05, 23.02(c), 2003 Tex. Gen. Laws 847, 856–57, 899.

[27] Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.06, 1987 Tex. Gen. Laws 37, 41, *amended by* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 972, *amended by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.02, 2003 Tex. Gen. Laws 847, 855 (current version at TEX. CIV. PRAC. & REM. CODE § 33.003).

responsibility found by the trier of fact, unless the percentage exceeded fifty percent. *Id.* § 33.013(a);[28] *F.F.P. Operating Partners, L.P. v. Duenez,* 237 S.W.3d 680, 687 (Tex. 2007). If a defendant's percentage of liability exceeded fifty percent, the defendant was jointly and severally liable for the entirety of the damages recoverable by the claimant. TEX. CIV. PRAC. & REM. CODE § 33.013(b); *Duenez,* 237 S.W.3d at 687.

Relevant to our determination of this issue is the definition of a "settling person." While "settle" and "settlement" were not defined in Chapter 33, *see C & H Nationwide, Inc. v. Thompson,* 903 S.W.2d 315, 319 (Tex. 1994), "settling person" was. A "settling person" was "a person who at the time of submission has paid or promised to pay money or anything of monetary value to a claimant at any time in consideration of potential liability . . . with respect to the personal injury, property damage, death, or other harm for which recovery of damages is sought." TEX. CIV. PRAC. & REM. CODE § 33.011(5).[29] Here, the trial court

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[28] Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3271, *amended by* Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.09, 1987 Tex. Gen. Laws 37, 42, *amended by* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 974, *amended by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 4.07, 4.10(5), 2003 Tex. Gen. Laws 847, 858–59 (current version at TEX. CIV. PRAC. & REM. CODE § 33.013).

[29] Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.07, 1987 Tex. Gen. Laws 37, 41, *amended by* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 973, *amended by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.05, 2003 Tex.

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refused MCI's request to include Central Texas as a "settling person" in a proportionate responsibility question in the jury charge. Whether the trial court erred in this ruling is crucial: a finding by the jury that Central Texas had a percentage of responsibility as a settling person could potentially have reduced MCI's percentage of liability to fifty percent or less, thus limiting the amount of damages MCI would have had to pay.

Our analysis of whether Central Texas is a settling person under Chapter 33 turns on a question of statutory construction. A question of statutory construction is a legal one which we review de novo, "ascertaining and giving effect to the Legislature's intent as expressed by the plain and common meaning of the statute's words." *Duenez,* 237 S.W.3d at 683 (citing *Tex. Dep't of Transp. v. City of Sunset Valley,* 146 S.W.3d 637, 642 (Tex. 2004)); *see also Leland v. Brandal,* 257 S.W.3d 204, 206 (Tex. 2008) (citing *Nat'l Liab. & Fire Ins. Co. v. Allen,* 15 S.W.3d 525, 527 (Tex. 2000)) (observing the necessity of a court determining and giving effect to the Legislature's intent in construing a statute).[30] We first look at "the statute's

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Gen. Laws 847, 856–57 (current version at TEX. CIV. PRAC. & REM. CODE § 33.011(5)).

[30] The court of appeals stated that the appropriate standard of review for the "settling person" inquiry is abuse of discretion. While it is true that we generally review a trial court's refusal to submit a particular instruction under an abuse of discretion standard, *see In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000), an issue of statutory construction is a legal question which we

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language to determine that intent, as we consider it 'a fair assumption that the Legislature tries to say what it means, and therefore the words it chooses should be the surest guide to legislative intent.'" *Brandal*, 257 S.W.3d at 207 (quoting *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999)). Thus, we consider the statute's plain and common meaning, and do not "look to extraneous matters for an intent the statute does not state." *Allen*, 15 S.W.3d at 527.

As noted, the applicable version of Chapter 33 defined "settling person" as a person who, at the time of submission, has paid or promised to pay *anything* of value to a claimant in consideration of liability. *C & H Nationwide*, 903 S.W.2d at 320. We apply the plain meaning of these words to the facts before us. Here, Central Texas had filed for bankruptcy, but its insurer deposited, on the bankruptcy court's order, the limits of its policy into the court's registry for payment to the Plaintiffs. Central Texas also agreed to pay the claimants $7,000 a year for five years. There is no question that the claimants who chose to obtain funds from the Apportionment Plan "settled" with Central Texas—they received money in exchange for a release of Central Texas's liability. But the Plaintiffs chose to participate in the Litigation Plan, which they claim could not constitute a

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review de novo. *See Duenez*, 237 S.W.3d at 638; *see also Galle v. Pool*, 262 S.W.3d 564, 571 n.3 (Tex. App.—Austin 2008, pet. denied).

settlement due to its uncertain and adversarial nature at the time of submission in the trial court.

As the court of appeals observed, all the parties in the bankruptcy court engaged in extensive negotiations over the division of the funds among the litigants, and Central Texas and its insurer did not oppose tendering the funds into the court's registry or participating in mediation. Thus, Central Texas definitely paid something of monetary value to the claimants, including the Plaintiffs—$5 million in insurance proceeds, plus $7,000 annually—in respect to its potential liability, and the Plaintiffs negotiated for, and were the ultimate recipients of, some of these proceeds. Central Texas was further discharged from tort liability in the bankruptcy court on approval of its reorganization plan, which the Plaintiffs approved. Although the Litigation Plan was arguably not styled a settlement by the claimants or bankruptcy court, it had all semblances of a settlement. *See Ratcliff v. Fibreboard Corp.*, 819 F. Supp. 584, 588–89 (W.D. Tex. 1992) (concluding that agreement was a final settlement under Chapter 33, despite language in the agreement to the contrary). We hold, under these facts, that Central Texas is a settling person, and the trial court should have submitted a question to the jury concerning Central Texas's proportionate responsibility as such.

The Plaintiffs advance several arguments supporting their position that Central Texas cannot be considered a settling person under the applicable version of Chapter 33. We address each in turn. First,

the Plaintiffs contend that the uncertain and adversarial nature of the Litigation Plan renders the Plan a form of litigation. One group of claimants—those who elected to participate in the Apportionment Plan—did immediately collect their proportion of the insurance funds, while those who elected to participate in the Litigation Plan deferred their receipt of the funds. Our inquiry, then, is whether electing to defer the collection of funds permits the Plaintiffs to deny Central Texas's status as a settling person. We conclude it does not. The definition of settling person requires only a promise to pay, not an actual payment, in consideration for a release from liability. *See C & H Nationwide*, 903 S.W.2d at 320. Here, there was, in essence, a promise to pay in consideration for Central Texas's release from liability. While the Plaintiffs chose to present arguments in a hearing before a special judge, the Litigation Plan also allowed the Plaintiffs to "agree at any time to approve full or partial distribution of the Litigation Funds to any or all participants," even without going before the special judge. There was never a real possibility that the Plaintiffs would not recover some amount of proceeds from the Litigation Fund: the Plaintiffs not only had the option of receiving the proceeds in the Litigation Fund at any time, but the Litigation Plan contained no provision for the return of any nonawarded proceeds to Central Texas or its insurer.

Further, even though the Plaintiffs chose not to approve distribution from the Litigation Fund before the hearing in front of the special judge, the hearing

was not adversarial in nature and the end result of the hearing was certain before it began. Central Texas was not present at the hearing and, of course, had no reason to be present since it had irrevocably paid money into the court's registry in exchange for a release from liability. Thus, the hearing lacked the adversarial nature the Plaintiffs contend existed. The Plaintiffs argue that the amount each claimant might have received following the hearing was uncertain. But the Litigation Plan capped the amount of each claimant's recovery at 110% of that determined by the mediator, and each participant in the Litigation Plan received within two percent of the amount determined by the mediator, with one exception. Even if the exact amount each claimant might have received was uncertain, there was little uncertainty that each Plaintiff was going to receive *some* amount. The statute does not require certainty in the actual amount of the money or thing of monetary value—just the promise that the person will receive something of value. TEX. CIV. PRAC. & REM. CODE § 33.011(5);[31] *see also Gilcrease v. Garlock, Inc.*, 211 S.W.3d 448, 455 (Tex. App.—El Paso 2006, no pet.) (holding settlement agreement was not contingent

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[31] Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.07, 1987 Tex. Gen. Laws 37, 41, *amended by* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 973, *amended by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.05, 2003 Tex. Gen. Laws 847, 856–57 (current version at TEX. CIV. PRAC. & REM. CODE § 33.011(5)).

because the defendants made an unconditional promise to pay).

Second, the Plaintiffs contend that Central Texas's release from liability in the bankruptcy court was involuntary under federal bankruptcy law, and thus cannot constitute a settlement. *See In re Arrowmill Dev. Corp.*, 211 B.R. 497, 503 (Bankr. D.N.J. 1997). But to hold that the definition of "settling person" requires a voluntary release of claims would compel us to insert language into the statute that is not there. *See Fortis Benefits v. Cantu*, 234 S.W.3d 642, 649 n.41 (Tex. 2007) (noting that courts "should not by judicial fiat insert non-existent language into statutes"). In any event, it is inaccurate to describe Central Texas's release from liability as involuntary. Central Texas and its insurer engaged in negotiations concerning not only the money to be placed in the bankruptcy court's registry and the manner in which funds were to be allocated, but also whether or not Central Texas was to be released from liability. When the Plaintiffs voted in favor of approving Central Texas's reorganization plan, they consented to release Central Texas from liability.

Third, the Plaintiffs contend that there was uncertainty *"at the time of submission."* TEX. CIV. PRAC. & REM. CODE § 33.011(5) (requiring the payment or promise to pay something of monetary value to have occurred "at the time of submission" in order for a person to be considered a "settling person")

(emphasis added).[32] But the fact that the Plaintiffs had not actually presented their cases to the special judge at the time of submission does not change whether or not the settlement was certain. At the time of submission in the trial court, Central Texas and its insurer had already deposited funds in the bankruptcy court's registry, the Litigation Plan had been in place for over two years, and the Plaintiffs had the option of requesting disbursement of their proportionate shares of the Fund.

Fourth, the Plaintiffs argue that the proper vehicle for proportioning some share of Central Texas's potential liability would have been through its joinder as a responsible third party. Under the applicable version of Chapter 33, a responsible third party was defined as a person (1) over whom the court can exercise jurisdiction, (2) who was not sued by the claimant, and (3) who is or may be liable for all or part of the damages claimed against the named defendant. TEX. CIV. PRAC. & REM. CODE § 33.011(6).[33]

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[32] Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.07, 1987 Tex. Gen. Laws 37, 41, *amended by* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 973, *amended by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.05, 2003 Tex. Gen. Laws 847, 856–57 (current version at TEX. CIV. PRAC. & REM. CODE § 33.011(5)). The current version of section 33.011(5) allows for the settlement to occur "at any time." TEX. CIV. PRAC. & REM. CODE § 33.011(5). The applicable version of the statute, however, was limited to settlements made "at the time of submission."

[33] Act of May 8, 1995, 74th Leg, R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 973, *amended by* Act of June 2, 2003, 78th Leg.,

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The term specifically excluded "a person or entity that is a debtor in bankruptcy proceedings or a person or entity against whom this claimant's claim has been discharged in bankruptcy, except to the extent that liability insurance or other source of third party funding may be available to pay claims asserted against the debtor." *Id.* The Plaintiffs contend that since a debtor in bankruptcy *without* the availability of liability insurance was excluded from the definition of responsible third party, it follows that a debtor in bankruptcy *with* the availability of liability insurance—like Central Texas—is a responsible third party.[34] Assuming that Central Texas could properly be characterized as a responsible third party, nothing in Chapter 33 suggested that a party's identification as a responsible third party or settling person is an either-or proposition. A person could potentially fall within the definitions of both settling person and responsible third party, and the Legislature included no language in Chapter 33 indicating otherwise. *See Brandal*, 257 S.W.3d at 206 (noting that the Legislature "tries to say what it means, and therefore the

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R.S., ch. 204, § 4.05, 2003 Tex. Gen. Laws 847, 856–57 (current version at TEX. CIV. PRAC. & REM. CODE § 33.011(6)).

[34] MCI did attempt to join Central Texas as a responsible third party, but the trial court refused this request. MCI appealed this decision to the court of appeals, which held that the trial court did not abuse its discretion in denying MCI's motion for leave to join Central Texas as a responsible third party. MCI did not brief this issue to this Court; accordingly, we express no opinion on the propriety of the trial court's refusal to submit a responsible third party question to the jury.

words it chooses should be the surest guide to legislative intent" (citing *Fitzgerald*, 996 S.W.2d at 866)); *Lee v. City of Houston*, 807 S.W.2d 290, 295 (Tex. 1991) (observing that a court may not "judicially amend a statute and add words that are not implicitly contained in the language of the statute"). The Legislature did not limit the designations of settling person and responsible third party as exclusive, and we will not read such a limitation into the statute. *See C & H Nationwide*, 903 S.W.2d at 320 (concluding that the definition of "settling person" is not limited to those who fully resolve all claims against them and includes those who settle only partially); *City of Rockwall v. Hughes*, 246 S.W.3d 621, 629 (Tex. 2008) (noting that a statute is to be interpreted as written, unless the context requires otherwise or the construction would lead to an absurd result).

Fifth, the Plaintiffs contend that to find Central Texas a settling person will confuse settlement jurisprudence and overbroadly designate a person as settling any time the person deposits funds in a court's registry. We disagree with this assertion. We do not hold that a deposit of funds in a court's registry is always akin to a settlement. Rather, it is so when, as here, the negotiations and terms of an agreement in every way resemble a settlement. When this is the case, we must define it as what it is—a settlement. As discussed before, Central Texas and its insurer did not simply deposit funds in the bankruptcy court's registry. They negotiated the terms of the deposits with the claimants and entered into a

mediated agreement where the claimants could either accept the funds immediately or defer acceptance to a later date, and Central Texas was released from liability. Our holding will also have no adverse effect on parties in bankruptcy proceedings or in settlement negotiations. To the contrary, parties in bankruptcy and related litigation will know that if they enter into an agreement that in all respects resembles a settlement, they will be deemed settling persons in related state litigation for purposes of Chapter 33.

Finally, the Plaintiffs point to statements made both in documents in the bankruptcy court[35] and by the bankruptcy court judge suggesting that the Litigation Plan was not a settlement under Chapter 33. In his dissent, CHIEF JUSTICE JEFFERSON also relies on these statements as indication that the Litigation Plan was not a settlement. But these statements were not part of the bankruptcy court's holdings. As the court of appeals observed, these were merely *ipse dixit* statements that, in any event, have no bearing on our interpretation of Texas law. *See Allen*, 15 S.W.3d at 527 (observing that we consider the statute's plain and common meaning and do not "look to extraneous matters for an intent the statute does not state"); *cf. In re W.E.R.*, 669 S.W.2d 716, 716

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[35] For example, the bankruptcy court order approving and describing the Apportionment Plan states that participation of a bus crash claimant in the Litigation Plan "shall not constitute a settlement." As the Plaintiffs note in their brief, the claimants prepared and agreed to the Apportionment Plan.

(Tex. 1984) (per curiam) (holding that appellate court may not accept a trial judge's oral comments as findings of fact or conclusions of law).

CHIEF JUSTICE JEFFERSON asserts that we improperly construe the circumstances under which the Plaintiffs pursued their claims in the bankruptcy court. We respectfully disagree. As discussed above, the portion of the Apportionment Plan concerning the Litigation Plan specifically provided that the Litigation Plan participants could agree *at any time* to distribution of Litigation Funds to any or all participants, provided that it was done in writing by all participants in the Litigation Plan. Although the Plaintiffs did not ultimately exercise this option, it was available to them at the time of submission in the trial court. Thus, at the time of submission, not only had Central Texas unilaterally deposited funds in the bankruptcy court registry for future distribution to the claimants, but the Plaintiffs—and other Litigation Plan participants—had the option of receiving those funds at any time. Moreover, even though the Plaintiffs ultimately decided to pursue the "litigation" option, the record belies a description of the hearing before the special judge as adversarial or contingent. The claimants crafted the Litigation Plan after extensive negotiations and, as previously mentioned, could not individually recover more than 110% of the mediator's allocation. While it is true that the Litigation Plan did not set a floor on each claimant's possible individual recovery, there was never a real possibility that any of the Plaintiffs—all victims of

the bus accident and their families—would receive none of the bankruptcy court funds, given that the hearing was uncontested and the Litigation Plan contained no provision for the return of undisbursed funds to Central Texas. This is not a retroactive view of the proceedings: because Central Texas's reorganization plan had previously been approved, Central Texas had no reason to appear at the hearing. Of course, the dissent correctly notes that the actual results of the hearing before the special judge are not relevant since we must determine settlement "at the time of submission." But the results—with all but one participant receiving within two percent of the amount assigned by the mediator—do highlight the fact that this was not actual, adversarial litigation with an uncertain outcome. There is further no indication in the record that other "potential parties" were entitled to the Litigation Funds in lieu of the Litigation Plan participants. Rather, the bankruptcy judge stated that other parties might be entitled to those funds if the Litigation Plan participants were not for whatever reason. At the time of submission, Central Texas had deposited the limits of its insurance policy in the bankruptcy registry and had been released from liability, and the Litigation Plan participants had the option of either receiving their proportionate shares of the funds or bringing their cases before a special judge in a nonadversarial hearing. Despite how the bankruptcy court or the Plaintiffs might describe these events, we conclude they constitute a settlement under Chapter 33.

Chapter 33 expresses the Legislature's intent to hold defendants responsible for only their own conduct. Its purpose is to hold each person "responsible for [the person's] own conduct causing injury." *Duenez*, 237 S.W.3d at 690. "This is consistent with a fundamental tenet of tort law that an entity's liability arises from its own injury-causing conduct." *Id.* We therefore hold that the trial court erred in refusing to submit a question to the jury concerning Central Texas's proportionate responsibility as a settling person.

## IV. Conclusion

For the foregoing reasons, we affirm the court of appeals' judgment and remand the case to the trial court for further proceedings consistent with this opinion.

Eva M. Guzman
Justice

OPINION DELIVERED: December 17, 2010

# IN THE SUPREME COURT OF TEXAS

No. 09-0048

MCI SALES AND SERVICE, INC.,
F/K/A HAUSMAN BUS SALES, INC. AND
MOTOR COACH INDUSTRIES MEXICO, S.A. DE C.V.,
F/K/A DINA AUTOBUSES, S.A. DE C.V., PETITIONERS,

v.

JAMES HINTON, INDIVIDUALLY AND AS
REPRESENTATIVE OF THE ESTATE OF
DOLORES HINTON, DECEASED, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

**Argued March 24, 2010**

CHIEF JUSTICE JEFFERSON, dissenting in part.

At the time this case was submitted to the jury, James Hinton[1] had neither received nor been promised any payments to settle his claims. Because the Court nevertheless concludes that Central Texas' payments to the bankruptcy court's registry rendered it a "settling person," I respectfully dissent in part.

[1] James Hinton is one of a number of plaintiffs whose claims are now before us. For ease of reference, I refer to them as "Hinton."

### 1. The statute requires courts to evaluate settling persons "at the time of submission."

Former section 33.011—the statutory provision applicable here—defined "settling person" as:

> a person who *at the time of submission* has paid or promised to pay money or anything of monetary value to a claimant at any time in consideration of potential liability . . . with respect to the personal injury, property damage, death, or other harm for which recovery of damages is sought.

Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.07, 1987 Tex. Gen. Laws 37, 41 (amended in 1995 and 2003) (current version at TEX. CIV. PRAC. & REM. CODE § 33.011) (emphasis added). Because the statute stipulated that a settling person was one who, "at the time of submission" of the jury question, had paid or promised to pay, reviewing courts cannot consider a post-submission monetary exchange when determining whether a party was a settling person. *See Knowlton v. U.S. Brass Corp.*, 864 S.W.2d 585, 598 (Tex. App.—Houston [1st Dist.] 1993) ("[A] party who settles after objections are made to the charge, after the charge is read to the jury, and after closing arguments, although before the jury begins deliberating, is not a settling person because the settlement had not been effected *at the time of submission.*"), *aff'd in part and rev'd in part on other grounds, sub nom. Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644 (Tex. 1996); *Gilcrease v. Garlock, Inc.*, 211 S.W.3d 448,

454–55 (Tex. App.—El Paso 2006, no pet.) (holding that settlement agreements cannot be contingent on any other outcome, at the time of submission, in order to satisfy chapter 33).

At the time the proportionate responsibility question was submitted to the jury, and throughout the course of the trial, Hinton had not settled any claims with Central Texas, and the funds that Central Texas placed in an interest-bearing account were never promised to any particular claimant. The bankruptcy court rejected the notion that the funds had a guaranteed trajectory, pointing to various contingencies, including the possibility that "some [of the claims] could be adjusted to zero." As a historical fact, of course, "each participant in the Litigation Plan received within two percent of the amount determined by the mediator, with one exception," ___ S.W.3d at ___, and "the Plaintiffs negotiated for and were the ultimate recipients of some of these proceeds," *id.* at ___. But those facts chronicle Hinton's status *after* submission, which is irrelevant under the statute. The trial court appropriately viewed Hinton's status at the time of submission, as no one could have known at that point whether Hinton would recover any of the remaining funds.

**2. Under Central Texas' bankruptcy reorganization, claimants had two choices: guaranteed payment under the Apportionment Plan or contingent recovery under the Litigation Plan.**

The Apportionment and Litigation Plans do, in some ways, bear the marks of a settlement. Central Texas tendered money to the bankruptcy court to satisfy claims against it, and it was released from liability. At the time of submission, however, money had not been paid or promised "to a claimant," as required under the statute, TEX. CIV. PRAC. & REM CODE § 33.011, but rather deposited into a court registry—the ultimate distribution of which remained uncertain.

Central Texas' insurers deposited the $5 million policy limits into the bankruptcy court's registry to set aside costs for the multiple bus crash claimants. Central Texas pledged to pay an additional $7,000 per year for five years, making the total amount available to such claimants around $5,035,000. Claimants were given two options regarding disbursement: (1) they could join the "Apportionment Plan," in which a mediator would delegate a percentage of liability to each defendant, after which participating claimants could either immediately collect funds, or receive an apportionment in future litigation; or (2) claimants could join the "Litigation Plan," in which participants chose a special judge, decided on the form of a proceeding, and ultimately reasserted their claims. As

the bankruptcy judge noted, recovery under the Litigation Plan was contingent on proof that the defendants' negligence "was a proximate cause of [the claimants'] injuries and/or damages. And then they had to prove, if they met that burden, the extent of the damages." Based on the evidence presented, the special judge would make new liability determinations, assign amounts owed, and, if enough funds remained, allot those funds accordingly. Hinton chose the Litigation Plan.

The bankruptcy judge summarized the plans as follows:

> One, it allowed the people that wanted their money now to take it. Those people who disagreed with their claim agreed that other people could take money, which diminished the pool. That's a huge agreement. And number two, it provided that, among themselves, they could re-challenge their numbers, and when it was all done, re-look at their percentage, and they'd only get a percentage of what was left. . . .
>
> They did agree among themselves that, no matter—that they would start with the number they originally had been given in the apportionment plan. . . . And they agreed that, no matter what the new evidence showed, they wouldn't increase their claim by more than ten percent. . . .

> . . . So, among themselves, they could go up or down some, but it wouldn't be more than ten percent up; *there was no limit on down.*

(Emphasis added.)

To further complicate matters, the bankruptcy judge recognized that other potential parties later appeared to be "entitled to recover some of the [remaining] two and half million," and that it may "turn[ ] out, for a number of reasons, that the litigation plan claimants are not entitled to it." As to this potential outcome, the judge noted that Litigation Plan claimants could be left in the cold:

> [T]he initial apportionment agreement, and the information available to whoever would look at that, has grown greatly. And, so, it's certainly possible that the information provided to the special judge could result in one or more or all of the parties here, the litigation fund claimants, having their claims adjusted. It's possible some could be adjusted to zero, just factually, just based on that information.

Consequently, Hinton, as a "litigation fund claimant," could not count on recovering any of the money set aside by Central Texas.

The Court's observation that "Plaintiffs had the option of requesting disbursement of their proportionate shares of the Fund," ___ S.W.3d at ___, mistakenly lumps members of the Apportionment Plan with members of the Litigation Plan. Hinton, a

member of the latter group, elected to try his claims in lieu of immediate receipt of his share of the insurance funds. It is true that the order approving the Apportionment Plan stipulated that

> [t]he parties may agree at any time to approve full or partial distribution of the Litigation Funds to any or all participants. Any agreement to distribute funds, however, must be agreed to in writing by all participants remaining in the Litigation Plan at the time the agreement is entered.

At the time the jury question was submitted, however, no party had attempted to enter into any such agreement, and even if any of them had, there was no guarantee that every other participant in the Litigation Plan would have agreed to such a distribution in writing. The parties rejected this option by refusing to enter into the Apportionment Plan in the first instance.

In fact, the above provision more likely referred to those parties who had not yet decided whether to join the Litigation Plan, and therefore had an option to join the Apportionment Plan before re-litigating their claims under the Litigation Plan. The preceding provision in the order approving the Apportionment Plan supports this interpretation, since it mandates that

> [e]ach participant in the Litigation Plan agrees that *any recovery from the Litigation Fund will necessitate that the claimant prove by a preponderance of the evidence* . . . that

> the negligence of [the defendants] was a proximate cause of the participant's injuries and/or damages; and . . . the amount of damages suffered by the claimant as a result of that negligence.

(Emphasis added.) The Apportionment Plan gave parties an opportunity to collect full or partial distribution of the funds. By rejecting this option, Hinton and others explicitly chose to re-litigate their claims. As the Court concedes, "the Litigation Plan did not set a floor on each claimant's possible individual recovery." ___ S.W.3d at ___.

### 3. Central Texas was not a "settling person" under the plain language of the statute.

While the Court correctly notes that "[t]he statute does not require certainty in the actual *amount* of the money or thing of monetary value," ___ S.W.3d at ___ (emphasis added), the statute does require certainty as to the *eventual receipt* of money or thing of monetary value. *See* TEX. CIV. PRAC. & REM. CODE § 33.003; *Hall v. White, Getgey, Meyer & Co., LPA*, 347 F.3d 576, 582–83 (5th Cir. 2003) (applying Texas law), *rev'd in part on other grounds*, 465 F.3d 587 (5th Cir. 2006); *Gilcrease*, 211 S.W.3d at 454–55.

The Court cites *Gilcrease v. Garlock* for the proposition that unconditional promises to pay are valid settlements for purposes of chapter 33. *See Gilcrease*, 211 S.W.3d at 455. *Gilcrease* holds that unconditional promises to pay are valid settlements,

however, only so long as the promises are not contingent on any outside factors, such as related litigation proceedings. In *Gilcrease*, settling defendants had yet to pay the full amount they had promised claimants, but they *had* made unconditional promises to pay. *Id.* Payment was not contingent on bankruptcy proceedings, or on any other future arrangements between the parties. *Id.* The *Gilcrease* court distinguished the case before it from two other cases that themselves more closely bore a resemblance to the facts before us now, *McNair v. Owens-Corning Fiberglas Corp.*, 890 F.2d 753 (5th Cir. 1989), and *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990), *rev'd, in part, on other grounds*, 151 F.3d 297 (5th Cir. 1998).

In *McNair*, the Fifth Circuit held that notes promising payment did not constitute a settlement if their ultimate payment depended on the outcome of insurance litigation. *McNair*, 890 F.2d at 755–56. In that case, asbestos plaintiffs received notes from two defendants who were in the process of litigating claims with their insurers. *Id.* Despite the fact that the notes constituted promises to pay, the court held that because payment was contingent on some future litigation—no matter how likely it was to end in their favor—the promise of payment could not be considered a settlement within the terms of the statute. *Id.*

The *Gilcrease* court next looked to a federal district court case, *Cimino v. Raymark Industries, Inc.*, 751 F. Supp. at 656. In that case, plaintiffs reached a non-cash settlement agreement with an

insolvent defendant who promised to pay a specified sum of money over a period of years. *Id.* The court held that, due to the defendant's insolvency, the settlement agreement was more like a promissory note, since "[p]ayment [was] contingent on the outcome of the unstable . . . bankruptcy proceedings and on the continued financial viability of the [defendant]." *Id.*

Like the defendant in *Cimino*, Central Texas (and its insurer) agreed to deposit money in the bankruptcy court. Hinton's receipt of these funds, however, remained contingent on the outcome of the Litigation Plan proceedings, and on the existence of additional claims from outside parties. Despite Central Texas' deposit of insurance funds, and its promise to pay a specified amount over a period of years, Hinton remained at risk of not recovering, and therefore, the agreement was at best akin to the "promissory note" in *Cimino*.

Bankruptcy courts often provide a "settle or litigate" option like the one used here. *See* Georgene Vairo, *Mass Torts Bankruptcies: The Who, The Why and The How*, 78 AM. BANKR. L.J. 93, 102 (2004) ("If a settlement was not reached, the claimant could elect mediation, binding arbitration, or traditional tort litigation."). Courts can distinguish between parties who choose to settle (like those under the Apportionment Plan), and those who choose to litigate (like those under the Litigation Plan). This ready distinction is evidenced by the terms of the bankruptcy court's order approving and describing the two plans:

> All Bus Crash Claimants participating in the Litigation Plan agree to be bound by the terms and conditions of the Litigation Plan. A failure to elect payment . . . constitutes an agreement to be bound by the terms of the Litigation Plan. *The participation of any Bus Crash Claimant in the Litigation Plan . . . shall not constitute a settlement* or compromise of the claimant's claims against the debtors.

(Emphasis added.)

I would hold that the court of appeals erred in reversing the trial court's refusal to submit Central Texas as a "settling person." Because the Court's holding regarding Chapter 33 neither complies with the statute ("at the time of submission"), nor properly construes the circumstances under which Hinton pursued his claims within the bankruptcy proceedings, I respectfully dissent from that part of the Court's judgment.

Wallace Jefferson
Chief Justice

**Opinion Delivered**: December 17, 2010

# IN THE SUPREME COURT OF TEXAS

No. 09-0048

MCI SALES AND SERVICE, INC., F/K/A HAUSMAN BUS SALES, INC. AND MOTOR COACH INDUSTRIES MEXICO, S.A. DE C.V., F/K/A DINA AUTOBUSES, S.A. DE C.V., PETITIONERS,

v.

JAMES HINTON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DOLORES HINTON, DECEASED, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

**Argued March 24, 2010**

## JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on petition for review from the Court of Appeals for the Tenth District, and having considered the appellate record, briefs, and counsels' argument, concludes that the court of appeals' judgment should be affirmed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The judgment of the court of appeals is affirmed;

2) The cause is remanded to the trial court for further proceedings consistent with this Court's opinion; and

3) The parties shall bear their own costs incurred in this Court and in the court of appeals.

Copies of this judgment and the Court's opinion are certified to the Court of Appeals for the Tenth District and to the District Court of McLennan County, Texas, for observance.

Opinion of the Court delivered by Justice Guzman, joined by Justice Hecht, Justice Wainwright, Justice Medina, Justice Johnson, Justice Willett, and Justice Lehrmann, and joined in part by Chief Justice Jefferson.
Dissenting opinion by Chief Justice Jefferson.
Justice Green did not participate in this opinion.

December 17, 2010

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[SEAL]

**IN THE**
**TENTH COURT OF APPEALS**

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**No. 10-06-00256-CV**

**MCI SALES AND SERVICE, INC., F/K/A HAUSMAN BUS SALES, INC., AND MOTOR COACH INDUSTRIES MEXICO, S.A. DE C.V., F/K/A DINA AUTOBUSES, S.A. DE C.V.,**

**Appellants**

**v.**

**JAMES HINTON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DOLORES HINTON, DECEASED, ET AL.,**

**Appellees**

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**From the 170th District Court**
**McLennan County, Texas**
**Trial Court No. 2003-2308-4**

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## OPINION

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The appeal of this products liability case primarily raises issues of federal preemption, legal sufficiency of the evidence, and proportionate responsibility.

Finding that the trial court abused its discretion by not asking the jury to find the bus driver's or his employer's proportionate responsibility as settling parties, we will reverse and remand.

## I. Background

This "crashworthiness" case arises from an accident involving a "motor coach" passenger bus near Waco on February 14, 2003. The passengers had boarded a bus chartered by Central Texas Trails and driven by Johnny Cummings to take them from Temple to Dallas. As the bus headed north on Interstate 35 (I-35), the weather conditions were overcast with reduced visibility due to fog, haze, and heavy rain. As the bus crested a hill just south of Waco, Cummings saw cars stopped ahead because a prior accident had caused northbound I-35 to be shut down. Instead of trying to stop in time to avoid hitting the stopped traffic ahead, Cummings steered to the left and drove the bus across the earthen median into the southbound lanes of I-35. The bus slammed head-on into a large SUV, instantly killing two of its occupants. The impact caused the bus to spin counterclockwise, tip over on its right side, and slide to a stop over the ditch between southbound I-35 and the west access road. Five passengers on the bus were killed, and many were injured.

The bus occupants and their relatives—many of whom are the Plaintiffs below and the Appellees here—made claims against the bankruptcy estates of

the bus owner—Central Texas Trails, Inc., Central Texas Bus Lines, Inc., and Kincannon Enterprises (collectively Central Texas)—and Cummings, a Central Texas employee. The liability insurance carrier for Central Texas and Cummings paid its $5 million in policy limits into the registry of the bankruptcy court to be held and distributed among those who had asserted claims against Central Texas and Cummings in accordance with the bankruptcy court's "Apportionment Plan" and "Litigation Plan."

The Plaintiffs then sued MCI Sales and Service Inc. and Motor Coach Industries Mexico, S.A. de C.V. (MCI), alleging that the bus was defectively designed and unreasonably dangerous because it was not equipped with three-point passenger seatbelts or with laminated glass passenger windows.[1] The case went to trial against only MCI, which had imported, assembled, and sold the bus to Central Texas. The trial

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[1] MCI joined Marcopolo, S.A., a Brazilian company that manufactured component parts of the bus, as a responsible third party, and also filed a third-party action against Marcopolo. Marcopolo made a special appearance, which the trial court sustained, and it severed MCI's third-party action against Marcopolo. In MCI's appeal of the special appearance ruling, we affirmed the trial court's decision. *See Motor Coach Indus., Inc. v. Marcopolo, S.A.*, 2007 WL 4157241 (Tex. App.—Waco Nov. 21, 2007, no pet.). MCI's eighth issue contends that, if the trial court erred by granting Marcopolo's special appearance, its severance of MCI's third-party action against Marcopolo would have been erroneous and the judgment should be reversed. Because we affirmed the trial court's decision on Marcopolo's special appearance, we overrule MCI's eighth issue.

court rejected MCI's attempts to join Central Texas and Cummings as responsible third parties and also refused to submit a question to the jury asking if they were liable as responsible third parties or settling parties for a proportionate liability determination. A jury found MCI liable and awarded approximately $17 million in damages to the Plaintiffs.

After the trial but before the final judgment was signed, and under the bankruptcy court's Litigation Plan, a special judge conducted a private hearing in which Cummings was found negligent and findings were made allocating the insurance proceeds among the claimants. After the bankruptcy court approved the findings, MCI moved the state trial court for settlement credits for the sums paid to the Plaintiffs from the bankruptcy proceeding. Rather than crediting MCI for those sums, the trial court entered a final judgment totaling just over $17 million but reciting that it has been "partially satisfied" as to each Plaintiff in the exact amount each received on their claims in the bankruptcy proceeding. MCI appeals, raising eight issues.

## II. Federal Preemption

We begin with MCI's third issue, which asserts that the Plaintiffs' state common-law defective design claims regarding seatbelts and laminated windows are impliedly preempted by federal law. The jury found that there was a design defect in the bus at the time it left MCI's possession because it did not have

passenger safety belts and because laminated glass was not used in the side passenger windows.

> The laws of the United States are the "supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. If a state law conflicts with federal law, it is preempted and has no effect. *Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981). A federal law may expressly preempt state law. *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). Additionally, federal law or regulations may impliedly preempt state law or regulations if the statute's scope indicates that Congress intended federal law or regulations to occupy the field exclusively or if state law actually conflicts with federal law or regulations. *Myrick,* 514 U.S. at 287, 115 S.Ct. 1483; *Moore v. Brunswick Bowling & Billiards Corp.,* 889 S.W.2d 246, 247–48 (Tex. 1994). State law presents an actual conflict with federal law when: (1) it is impossible for a private party to comply with both state and federal requirements; or (2) state law obstructs accomplishing and executing Congress' full purposes and objectives. *See Myrick,* 514 U.S. at 287, 115 S.Ct. 1483 (citing *English*, 496 U.S. at 79, 110 S.Ct. 2270 and *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)).
>
> The United States Supreme Court limits the preemption doctrine by presuming that

> Congress did not intend to displace state law. *See Maryland,* 451 U.S. at 746, 101 S.Ct. 2114; *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). Historically, states have exercised primary authority in matters involving their citizens' public health and safety. *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 475, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). Thus, this presumption is nowhere stronger than under circumstances in which the states are exercising that authority. *See Hillsborough County v. Automated Med. Labs., Inc.,* 471 U.S. 707, 718–19, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985). Common-law actions based upon negligence and products liability involve the state's power to regulate health and safety matters. *See Moore,* 889 S.W.2d at 249. Accordingly, the party urging preemption has the difficult burden of overcoming the presumption against preemption. *See Silkwood v. Kerr McGee Corp.,* 464 U.S. 238, 255, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984) (stating that the party urging preemption has the burden of proof).

*Great Dane Trailers, Inc. v. Estate of Wells,* 52 S.W.3d 737, 743 (Tex. 2001); *see also Sprietsma v. Mercury Marine,* 537 U.S. 51, 64–65, 123 S.Ct. 518, 527, 154 L.Ed.2d 466 (2002); *Turoff v. McCaslin,* 222 S.W.3d 664, 668 (Tex. App.—Waco 2007, no pet.).

MCI argues that the seatbelt and laminated-window design defect claims are impliedly preempted because they conflict with federal motor vehicle

regulations. The Texas Supreme Court has on at least two occasions summarized the history of the National Traffic and Motor Vehicle Safety Act, the statutory source for those regulations. *See Great Dane*, 52 S.W.3d at 742; *Hyundai Motor Co. v. Alvarado*, 974 S.W.2d 1, 3–4 (Tex. 1998). We quote from *Great Dane*:

> In 1966, Congress enacted the Safety Act, implemented under the National Highway Traffic Safety Administration's authority. The Safety Act's explicit purpose is "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381 (recodified at 49 U.S.C. § 30101). To accomplish this purpose, Congress empowered the Secretary of Transportation to adopt motor vehicle safety standards. 15 U.S.C. § 1392(a) (recodified at 49 U.S.C. § 30111(a)). These standards must be "reasonable, practicable and appropriate." *See* 15 U.S.C. § 1392(f)(3) (recodified at 49 U.S.C. § 30111(b)(3)). Additionally, the standards must meet the need for motor vehicle safety and be stated in objective terms. *See* 15 U.S.C. § 1392(a) (recodified at 49 U.S.C. § 30111(a)). The standards the Secretary adopts under the Safety Act are, fundamentally, performance requirements, not design requirements. *See Perry v. Mercedes Benz, Inc.*, 957 F.2d 1257, 1260 (5th Cir. 1992). In fact, the Safety Act's legislative history states:
>
> > [T]he new and revised standards are expected to be performance standards,

> specifying the required minimum safe performance of vehicles but not the manner in which the manufacturer is to achieve the specified performance. . . . The Secretary would thus be concerned with the measurable performance of a . . . system but not its design details.
>
> S. REP. NO. 89-1301, at 4 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2712.

*Great Dane*, 52 S.W.3d at 742 (footnote omitted).

### *A. Seatbelts*

MCI contends that the Plaintiffs' seatbelt claims are impliedly preempted by FMVSS 208, the federal regulation applicable to safety systems for buses, and by NHTSA's rejections of a standard that would require passenger seatbelts on buses.[2] *See* 49 C.F.R. § 571.208. Rule S4.4.3.1 of FMVSS 208 requires that each bus with a gross vehicle weight rating of more than 10,000 pounds comply with the requirements of Rules S4.4.2.1 or S4.4.2.2. Both of those rules require

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[2] Two Texas Supreme Court decisions have addressed the implied preemption of state common-law tort claims by federal motor vehicle safety standards: *Hyundai Motor Co. v. Alvarado*, 974 S.W.2d 13 (Tex. 1998) (holding that the Safety Act and FMVSS 208 did not expressly or impliedly preempt a tort claim based on the manufacturer's failure to install lap belts); and *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 744–49 (Tex. 2001) (holding that the Safety Act and FMVSS 108 did not impliedly preempt common-law "conspicuity" tort based on inadequate lighting and reflectors on truck trailer).

either a "complete passenger protection system" or a "belt system," but only for the bus driver. FMVSS 208 does not require passenger seatbelts or address the specific passenger compartmentalization standards for motor coach buses. The two rules expressly mandate belt restraint for the driver *only*. The parties agree that FMVSS 208 does not require the installation of passenger seatbelts or regulate compartmentalization for passenger protection in motor coach buses. Compartmentalization is required and regulated in school buses by FMVSS 222, but that standard does not apply to motor coach buses.

### *1. Compliance Impossibility*

The Plaintiffs point out what MCI essentially concedes: FMVSS 208 is silent regarding motor coach passenger protection; it does not regulate seatbelts or compartmentalization for motor coach passengers. Citing the concurring testimony of Virgil Hoogestraat, MCI's Vice President of Engineering, the Plaintiffs highlight that federal regulations neither forbid nor require the installation by MCI of passenger seatbelts in its motor coach buses, and Hoogestraat admitted that MCI could install passenger seatbelts if it chose. Plainly, therefore, it would not be impossible for MCI to install passenger seatbelts and be in compliance with federal regulations. *See Sprietsma*, 537 U.S. at 64–65, 123 S.Ct. at 527 ("We have found implied conflict pre-emption where it is 'impossible for a private party to comply with both state and federal requirements,'" . . .).

### 2. *Frustration of Federal Purpose*

MCI next contends that the Plaintiffs' seatbelt claims are impliedly preempted because NHTSA "considered and has repeatedly and expressly rejected" a federal standard that would require passenger seatbelts on "buses." In 1973, NHTSA began to study whether to enact regulations requiring seatbelts in school buses, intercity buses, and transit buses and initially proposed a standard that provided bus manufacturers with the option of installing passenger seatbelts with a warning system to signal the passenger and driver when a passenger's seatbelt was unbuckled. *See* 38 Fed. Reg. 4776 (Feb. 22, 1973); 39 Fed. Reg. 27,585 (July 30, 1974). But one year later, NHTSA withdrew that proposed standard for intercity and transit buses, citing cost/benefit studies of the present seating performance: "Injury statistics for intercity buses indicate that seating improvement would not reduce injuries substantially. Seat belt usage surveys in intercity buses also indicate that a very low percentage of passengers would utilize seat belts if they were provided." 39 Fed. Reg. 27,585. NHTSA also expressly eliminated the option of permitting bus manufacturers to install seatbelts *on school buses*, determining that a passive system of occupant containment by the seating system (compartmentalization) or a restraining barrier offered the most reliable crash protection in a school bus. *Id.* at 27,585–86.

Next, in 1983, NHTSA denied a petition for rulemaking that would have mandated the installation of

seatbelts *on school buses*. 48 Fed. Reg. 47,032 (Oct. 17, 1983). And finally, in 1992, in response to an inquiry from MCI, NHTSA's chief counsel concluded that a proposed New York statute requiring seatbelts in intercity buses appeared to be preempted by FMVSS 208. As a result of the above, MCI thus concludes that the imposition of a state common-law duty on motor coach bus manufacturers to install passenger seatbelts would obstruct or frustrate a federal purpose.

We agree with the Plaintiffs that none of NHTSA's actions present a clear indication of a conscious federal policy against passenger seatbelts in motor coach buses. Regarding the 1973 and 1974 actions, the Plaintiffs note the low percentage of general seatbelt usage then (10–15%), whereas current seatbelt usage rates exceed 80%. And as for NHTSA's 1983 denial of the petition to require seatbelts in *school buses*, it is clear that that decision was based on policy considerations unique to school buses and child passengers, along with NHTSA's mandated compartmentalization for school buses as a passive form of passenger protection. Finally, NHTSA's chief counsel's conclusion in 1992 that the proposed New York statute requiring seatbelts in intercity buses appeared to be preempted by FMVSS 208 would implicate only the express preemption clause of the Safety Act. *See* 49 U.S.C. § 30103(b)(1). State legislation or regulation is expressly preempted unless it is identical to the federal standard. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 868, 120

S.Ct. 1913, 1918, 146 L.Ed.2d 914 (2000); *Great Dane*, 52 S.W.3d at 741.

In conclusion, the 35-year-old NHTSA decision not to require passenger seatbelts in motor coach buses and NHTSA's actions regarding school buses do not persuade us that a conscious federal policy opposes passenger seatbelts in motor coach buses. We see no expressed opposition to the installation of passenger seatbelts in motor coaches, and Carl Nash, who was a senior executive with NHTSA for eighteen years, testified that passenger seatbelts are not prohibited or even discouraged by the federal government.[3] In fact, in 1989, seven years before the MCI bus at issue was sold, MCI asked NHTSA to provide guidance on how to anchor seatbelts in an MCI motor coach. NHTSA declined to provide specific guidance, noting: "Federal law leaves the question of how any such anchorages should be designed entirely up to the judgment of the bus manufacturer." And finally, as discussed in more detail below, the absence of federal regulation or the decision not to take regulatory action is not preemptive in this case. *See Sprietsma*, 537 U.S. at 64–68, 123 S.Ct. at 527–29; *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286–87, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 385 (1995).

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[3] While not determinative, we note that the National Transportation Safety Board, which investigates transportation accidents but has no regulatory power in the area of safety standards for motor vehicles, has repeatedly recommended passenger seatbelts for motor coaches since 1968.

Because there has been no clear federal expression of opposition to the installation of passenger seatbelts in motor coaches, we cannot say that a state common-law duty in tort to install passenger seatbelts is impliedly preempted; such a duty does not frustrate or "stand as an obstacle to the accomplishment and execution" of federal purposes and objectives. Therefore, in this respect, MCI has not met the difficult burden of overcoming the presumption against preemption. *See Great Dane*, 52 S.W.3d at 743 (citing *Silkwood*, 464 U.S. at 255, 104 S.Ct. at 625).

### *3. The* Geier *Approach*

Finally, relying on *Geier v. American Honda*, MCI argues that the Plaintiffs' state common-law seatbelt claims are preempted because allowing them forecloses an option or choice left open by FMVSS 208 and NHTSA's actions relating to bus-passenger safety. In *Geier*, the plaintiffs claimed that a passenger-car manufacturer, who was in compliance with the federal standard, was nonetheless liable because it did not equip a 1987 vehicle with airbags. At the relevant time in *Geier*, FMVSS 208 required car manufacturers to equip *some, but not all*, 1987 vehicles with passive restraints. The version of FMVSS 208 at that time required manufacturers to equip only 10% of their car fleet manufactured after September 1, 1987 with passive restraints, and it increased that percentage to 100% in three annual stages. The standard explained that the phased-in requirement and the variety and mix of

passive-restraint devices were deliberate to allow more time for manufacturers to develop airbags and other safer devices. *Geier*, 529 U.S. at 878–79, 120 S.Ct. at 1924.

After reviewing the history of FMVSS 208, the Court concluded that it reflects the Transportation Secretary's policy that safety would be best promoted if manufacturers installed alternative passive-restraint systems in their cars rather than one particular system in every car. *Id.* at 881, 120 S.Ct. at 1925. On the other hand, the Court noted, the plaintiffs' common-law claims were based on the presumption that *all* cars had to have airbags even if they had some other passive-restraint device. *Id.* The common-law claims thus presented an obstacle to manufacturers using the variety and mix of passive-restraint devices (airbags, automatic seatbelts, etc.) that FMVSS 208 sought to promote and an obstacle to the gradual passive restraint phase-in that it deliberately imposed. *Id.* at 878–82, 120 S.Ct. at 1924–26. The Court noted that Congress and NHTSA had expressed a preference for giving car manufacturers a choice between airbags and other safety devices for the period of time in which the plaintiffs' car was manufactured. *Id.* at 878–81, 120 S.Ct. at 1924–25. Accordingly, the Court held that the Safety Act and FMVSS 208 impliedly preempted the plaintiffs' common-law claims because they "stood 'as an obstacle to the accomplishment and execution of' the

important means-related federal objectives."[4] *Id.* at 881–82, 120 S.Ct. at 1925 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)).

MCI, attempting to come within the *Geier* framework, contends that allowing the imposition of a common-law duty to install passenger seatbelts forecloses the option of using compartmentalization as the primary passenger safety system in motor coach buses. MCI postulates that federal regulations give the bus industry a choice of two systems for restraining passengers: a passive system (compartmentalization) or a forced system (seatbelt). MCI thus concludes that the trial court's judgment imposes a state common-law duty to install seatbelts and removes MCI's option to use compartmentalization, in conflict with the alleged federal regulatory scheme.

We do not see, however, a regulatory scheme for motor coach bus passenger safety remotely similar to that for airbags such that MCI's theory fits within the *Geier* template. *Cf. BIC Pen Corp. v. Carter*, 251 S.W.3d 500, 503–09 (Tex. 2008) (applying *Geier*-type analysis in review of extensive regulatory scheme for

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[4] The Court also construed the Safety Act's preemption clause and saving clause together, concluding that the Safety Act does not *expressly* preempt "nonidentical state standards established in tort actions covering the same aspect of performance as an applicable federal standard." *Geier*, 529 U.S. at 868, 120 S.Ct. at 1918.

child-resistant cigarette lighters similar to that in *Geier* and holding the design-defect claim relating to cigarette lighter was impliedly preempted). Implied conflict preemption in *Geier* was premised on the federal government's clear and deliberate policy against requiring all cars to have airbags, instead opting for a gradual phase-in using a variety of passive protection devices that carmakers could choose from. Here, and unlike the version of FMVSS 208 at issue in *Geier* (which specifically granted passive restraint design options for carmakers), there is no federal regulation that addresses passenger seatbelts in motor coach buses.[5] Nor is there a federal

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[5] And as we stated above, there has been no clear federal expression of opposition to the installation of passenger seatbelts in motor coaches. In fact, the Plaintiffs have asked us to take judicial notice on appeal of NHTSA's most recent motor coach safety paper that contradicts MCI's recitation of NHTSA's view of passenger seatbelts in motor coach buses. *See* TEX. R. EVID. 201; *Office of Pub. Util. Counsel v. P.U.C.*, 878 S.W.2d 598, 600 (Tex. 1994) (court of appeals erred in refusing to take judicial notice of published P.U.C. order) ("To be the proper subject of judicial notice, a fact must be 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.' TEX. R. CIV. EVID. 201. Judicial notice is mandatory if 'requested by a party and [the court is] supplied with the necessary information.' TEX. R. CIV. EVID. 201. A court of appeals has the power to take judicial notice for the first time on appeal.").

That paper is a NHTSA document released on August 6, 2007, entitled "NHTSA's Approach to Motorcoach Safety," authored by Roger A. Saul, NHTSA's director of its Office of Crashworthiness Standards, and filed in NHTSA's Docket No. 2007-28793 ("Motorcoach Safety Plan") (available at http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/Vehicle%20Safety/Articles/

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regulation addressing the motor coach compartmentalization choice that MCI claims it was entitled to choose instead of seatbelts. What does exist is a compartmentalization standard—FMVSS 222—that indisputably applies *only* to school buses. We thus reject MCI's *Geier* approach.

MCI's implied preemption argument using *Geier* is further flawed because the absence of federal regulation is not preemptive in this case. Two cases highlight that flaw. In *Freightliner v. Myrick,* the plaintiffs alleged that tractor-trailers manufactured

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Associated%20Files/481217.pdf). It begins by noting its goal: "to present a comprehensive review of motorcoach safety issues and the course of action the National Highway Traffic Safety Administration will pursue to most expediently address them." *Id.* at 1. Regarding seatbelts, the paper states:

> Seat belts are another approach for potential improved motorcoach occupant protection in crashes. Installing seat belts would be the most direct method of retaining passengers within the seating compartment. . . . Seat belts could also potentially provide protection in multiple crash modes, including rollover, and prevent ejection.
>
> Both Australia and Europe require seat belts on motorcoaches. Australian Design Rule (ADR) 68 has required lap and shoulder belts since 1994. In Europe, ECE R.80 Amendment 1 has required a lap belt or a lap/shoulder belt since 1998.

*Id.* at 12–13.

The seatbelt section of the paper concludes with NHTSA's planned approach of conducting crash tests to obtain information to develop FMVSS 210-type performance requirements for the seatbelt assembly and seat anchorages. *Id.* at 14.

by the defendants were defective because they lacked an antilock-braking system (ABS). *Myrick,* 514 U.S. at 282, 115 S.Ct. at 1485. FMVSS 121, the applicable standard, did not include any requirement or prohibition regarding ABS. *Id.* at 286, 115 S.Ct. at 1487. The Court held that "the absence of a federal standard cannot implicitly extinguish state common law." *Id.* at 282, 115 S.Ct. at 1485.

The Supreme Court addressed the "absence of regulation" question again in *Sprietsma v. Mercury Marine,* which involved a product liability claim that a boat engine should have been equipped with a propeller guard. *Sprietsma,* 537 U.S. at 54, 123 S.Ct. at 522. The applicable federal regulation did not require or prohibit propeller guards. *Id.* at 65, 123 S.Ct. at 527. After recognizing that the Coast Guard had considered propeller guard regulation but decided not to adopt one requiring propeller guards, a unanimous Supreme Court held that the decision not to adopt a regulation did not impliedly preempt a state common-law claim:

> We first consider, and reject, respondent's reliance on the Coast Guard's decision not to adopt a regulation requiring propeller guards on motorboats. It is quite wrong to view that decision as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation. The decision in 1990 to accept the subcommittee's recommendation to "take no regulatory action," App. 80, left the law applicable to propeller guards exactly

> the same as it had been before the subcommittee began its investigation. Of course, if a state common-law claim directly conflicted with a federal regulation promulgated under the Act, or if it were impossible to comply with any such regulation without incurring liability under state common law, preemption would occur. This, however, is not such a case.

*Id.* at 67, 123 S.Ct. at 528.

The Court also distinguished *Geier* and the regulatory history at issue there; it noted that although the Coast Guard's decision not to require propeller guards—which "presents a sharp contrast to the decision" that was given preemptive effect in *Geier*—was undoubtedly intentional and carefully considered, that decision did not convey an authoritative message of a federal policy against propeller guards.[6] *Id.*

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[6] MCI also relies on two unpublished trial court decisions that were not appealed: *Surles v. Greyhound Lines, Inc.*, 2005 WL 1703153 (E.D. Tenn. July 20, 2005), and *Schunck v. Delaware Transit Corp.*, 2007 WL 1748647 (Del. Super. Ct. June 1, 2007). *Surles*, like this case, involved a claim that seatbelts should have been installed on an MCI bus operated by Greyhound. The district court focused—incorrectly under *Sprietsma*, in our view—on "whether a common law claim would conflict with the agency's *reasons* for declining to regulate." *Surles*, 2005 WL 1703153, at *6. In *Sprietsma*, the Court took full note of the Coast Guard's explanation why it did not require propeller guards, and that decision did not convey an authoritative message of a federal policy against propeller guards. *Sprietsma*,

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The Safety Act's saving clause[7] allows state common law to impose higher standards, assuming they do not actually conflict with federal law or "stand as an obstacle to the accomplishment and execution" of federal purposes and objectives. *Great Dane*, 52 S.W.3d at 746–47 (citing 15 U.S.C. § 1397(k) (recodified at 49 U.S.C. § 30103(e)), and quoting *Geier*, 529 U.S. at 868, 120 S.Ct. at 1918 ("We have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions. . . .")). We hold that

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537 U.S. at 61–62, 66–67, 123 S.Ct. at 525–28. Likewise, NHTSA has not conveyed an authoritative message against passenger seatbelts in motor coach buses. We disagree with *Surles*. We disagree as well with the analysis in *Schunck*, which also concerned a claim that seatbelts should have been installed on a transit bus. There the trial court focused—incorrectly in our view—on a supposed "10,000 pound weight standard" and on the fact that NHTSA requires passenger restraints on buses weighing less than 10,000 pounds. *Schunck*, 2007 WL 1748647, at *3. That analysis, like the one in *Surles*, misses the mark set in *Myrick* and *Sprietsma* and misapplies *Geier*.

We find inapposite *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377 (7th Cir. 2000), which involved claims by a bus driver that MCI's bus was defective because it was equipped only with a two-point lap belt. *Hurley* did not involve passenger seatbelts, and because FMVSS 208 does regulate bus driver restraint and protection systems and provides options for bus driver restraint systems, *Geier* did apply to impliedly preempt the plaintiffs' claims that a three-point seatbelt, an airbag, and a steel cage for the driver were all required. *Id.* at 380–82.

[7] 49 U.S.C. § 30103(e) ("Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.").

the Safety Act and FMVSS 208 do not impliedly preempt the Plaintiffs' common-law claims relating to MCI's failure to have installed passenger seatbelts on the MCI bus at issue because that claim is not in actual conflict with federal law or federal purposes and objectives.

### *B. Laminated Glass Side Windows*

We next address MCI's point that the Plaintiffs' state common-law defective design claims regarding laminated passenger windows are impliedly preempted by federal law. The jury found that there was a design defect in the bus because laminated glass was not used in the side passenger windows.

FMVSS 205 is the safety standard applicable to the requirements for windows in "multiple passenger vehicles." 49 C.F.R. 571.205. The standard provides that "glazing materials for use in motor vehicles must conform to ANSI/SAE Z26.1-1996." 49 C.F.R. 571.205(S5.1). At the time the bus at issue was manufactured, ANSI/SAE Z26.1-1996 provided a bus manufacturer could use either laminated or tempered glass in the passenger windows.[8] The Plaintiffs note that

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[8] The term "laminated glass" means two or more pieces of sheet, plate, or float glass bonded together by an intervening layer or layers of plastic material. It will crack or break under sufficient impact, but the pieces of glass tend to adhere to the plastic. If a hole is produced, the edges are likely to be less jagged than would be the case with ordinary annealed glass. ANSI/SAE Z26.1-1996 § 1.6.

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the windows in the subject bus were equipped with two panes of tempered glass and point to evidence that, since 1970, MCI has used two types of glazing for passenger windows: (1) a single pane of laminated glass, and (2) a dual pane system, with one pane of laminated glass and one pane of tempered glass. The parties do not dispute that the subject bus's passenger windows complied with FMVSS 205 and ANSI/SAE Z26.1-1996.

In *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007), a minor was seriously injured when she was partially ejected from the passenger side window of a 2004 Chevrolet Tahoe during a rollover accident. In their suit against General Motors, the plaintiffs claimed that GM's use of tempered glass in the side windows was unreasonably dangerous and that the use of advanced glazing (laminated glazing and glass-plastic glazing material) would have decreased the likelihood of passenger ejection. The district court found that the plaintiffs' claims were impliedly preempted by FMVSS 205. *See O'Hara v. General Motors Corp.*, 2006 WL 1094427 (N.D. Tex. Apr. 25, 2006). On appeal, the Fifth Circuit addressed the precise issue before us: "This appeal is about

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The term "tempered glass" means a single piece of specially treated sheet, plate, or float glass possessing mechanical strength substantially higher than annealed glass. When broken at any point, the entire piece breaks into small pieces that have relatively dull edges as compared to those of broken pieces of annealed glass. *Id.* at § 1.21.

whether FMVSS 205, which governs motor vehicle glazing safety, preempts a common law suit alleging that GM's use of a permitted glazing technology was unsafe. We are the first appellate court to rule on this question." *O'Hara*, 508 F.3d at 757.

After detailing federal policy and NHTSA's activity relating to FMVSS 205 and applying *Geier* and *Sprietsma*, the court held that the plaintiffs' claims were not impliedly preempted. *Id.* at 759–63. "Because we find that FMVSS 205 differs significantly from FMVSS 208 and does not establish a federal policy which would be frustrated by a state common law rule requiring advanced glazing in side windows, we hold that the O'Haras' suit is not preempted." *Id.* at 758.

At least two federal district courts have followed *O'Hara*. *See Spruell v. Ford Motor Co.*, 2008 WL 906648 (W.D. Ark. Apr. 1, 2008); *Burns v. Ford Motor Co.*, 2008 WL 222711 (W.D. Ark. Jan. 24, 2008). We will likewise. Based on the Fifth Circuit's careful analysis, we hold that the Plaintiffs' design defect claims relating to MCI's failure to use laminated glass in the side passenger windows are not impliedly preempted by FMVSS 205. We overrule MCI's third issue. Finding that Plaintiffs' claims are not preempted by federal law, we turn to MCI's state-related issues.

## III. Legal Sufficiency of the Evidence

MCI's fourth and fifth issues assert that the evidence is legally and factually insufficient to support the jury's design defect and causation findings. We will address MCI's legal sufficiency complaints and its sixth issue, which complains that the trial court improperly denied MCI's *Daubert* challenge to one of the Plaintiffs' experts.

In reviewing the legal sufficiency of the evidence, we view the evidence in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 822 (Tex. 2005). There is legally insufficient evidence or "no evidence" of a vital fact when (a) there is a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence conclusively establishes the opposite of the vital fact. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997).

### *A. Safer Alternative Design*

MCI's fourth issue asserts that there is legally insufficient evidence of a safer alternative design for three-point seatbelts, focusing primarily on the testimony of Plaintiffs' structural engineering expert

Lonney Pauls. We will therefore address MCI's sixth issue at this point.

### *1. Qualified Expert*

MCI argues that Pauls was unqualified to give opinion testimony about seatbelts in buses. The trial court serves as an evidentiary gatekeeper by screening out irrelevant and unreliable expert evidence, and it has broad discretion to determine the admissibility of evidence. *General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 590 (Tex. 1999); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995).

The Rules of Evidence provide: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of opinion or otherwise." TEX. R. EVID. 702. To establish a witness's expert qualifications, the party calling the witness must show "that the expert has 'knowledge, skill, experience, training, or education' regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject." *Roberts v. Williamson*, 111 S.W.3d 113, 121 (Tex. 2003) (quoting *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996) (quoting Rule 702)). Whether a witness is qualified to offer expert testimony is a matter committed to the trial court's discretion. *Broders*, 924 S.W.2d at 151.

MCI points to the following regarding Pauls's alleged lack of qualifications: he has never helped or advised a bus manufacturer; he has never actually engineered seatbelt installation, the design of a seat to hold the loads of a seatbelt, or the design of the anchors to hold the seat load; this was the first case in which he studied occupant protection; and he has no degree or teaching experience in the area of occupant protection. The main problem with MCI's complaint about Pauls's qualifications is that the alleged testimony (from Volume 11 of the reporter's record) that MCI relies on was that of Carl Nash, the former NHTSA executive, not Pauls.

Pauls, a structural engineer, testified about the structural characteristics of the bus and its ability to support seatbelts. He has a bachelor's degree in mechanical engineering and master's degree in Applied Mechanics, which is the advanced study of structures, structural dynamics, advanced dynamics, gas dynamics, fluid dynamics, and finite element methods. Among other things (such as designing the suspension for NASA's lunar rover while employed by General Motors), Pauls has: (1) performed all of the structural analysis and design on NHTSA's Unitized Safety School Bus project, including seat supports, which led to the development of FMVSS 222; (2) performed data analysis of bus-seat testing for the U.S. Department of Transportation; and (3) designed computer modeling programs to simulate the performance of seatbelt and airbag systems. He had been hired by Greyhound, MCI's former owner, to

perform structural analysis on an MCI motor coach, and he actually worked in an MCI facility to help it design a remedy for structural cracking in its buses. One area in which Pauls testified in this case was his description of how MCI's motor coach could have been retrofitted with seatbelts.

The trial court did not abuse its discretion in finding that Pauls was qualified as an expert in this case. We overrule MCI's sixth issue.

### 2. *Specific Design to Install Three-point Seatbelts*

> A design defect renders a product unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use. A plaintiff must prove that there is a safer alternative design in order to recover under a design defect theory. An alternative design must substantially reduce the risk of injury and be both economically and technologically feasible.

*Sanchez*, 997 S.W.2d at 588 (footnotes and citations omitted); *see General Motors Corp. v. Burry*, 203 S.W.3d 514, 533 (Tex. App.—Fort Worth 2006, pet. denied); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 82.005 (Vernon 2005). A plaintiff can prove technological feasibility of a safer alternative design with evidence that another manufacturer uses it. *See Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 746 (Tex. 1980); *Honda of Am. Mfg. v. Norman*, 104

S.W.3d 600, 607 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

The jury was given the following instruction in the design defect question on the absence of passenger seatbelts:

> A "design defect" is a condition of the product that renders it unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use. For a design defect to exist there must have been a safer alternative design.
>
> "Safer alternative design" means a product design other than the one actually used that in reasonable probability—
>
> (1) would have prevented or significantly reduced the risk of the injury in question without substantially impairing the product's utility; and
>
> (2) was economically and technologically feasible at the time the product left the control of MCI by the application of existing or reasonably achievable scientific knowledge.

We review the sufficiency of the evidence in light of this instruction. *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 71 (Tex. 2000).

MCI first claims that there is legally insufficient evidence of a specific design to install three-point seatbelts in the motor coach bus in question. MCI posits that Pauls's retrofit design to supposedly

strengthen the bus structure so that it could accommodate seats with seatbelts was only conceptual and thus legally insufficient.

Pauls's principal opinion was that the MCI motor coach bus could have been modified to handle a three-point seatbelt system without unreasonable additional weight or cost and without significantly altering the "semimonocoque" structure (a structure whose "skin" supports some of the load but also has underlying construction that supports most of the load) of the bus and without interfering with or impairing its utility. He summarily stated that modifying the MCI bus was economically and technologically feasible at the time it left MCI's control; specifically, Pauls testified that the bus's structure was inadequate to support seats with three-point seatbelts, so he created a concept retrofit design of the bus in question that increased the bus structure's strength so that it could accommodate anchored seats with three-point seatbelts. He used a mathematical engineering software program to calculate the size, strength, and location of the retrofit materials needed to support such seats in a crash situation that would meet FMVSS 210 crash standards. Pauls opined that the cost of his retrofit to the bus in question was $3,910 per bus.

MCI asserts four particular complaints about Pauls's testimony. Its first two complaints are that there is no testimony about the details or manner in which the seatbelts would be installed and that Pauls's concept used the measurements of the

Australian-made "G-2 StyleRide" seat, which was not approved until mid-1996, which was after MCI built the bus in question. MCI's other two complaints are that Pauls did not offer a "design" of how the seatbelts would be attached and an economic and technological study of that design; he offered only an incomplete design showing where some of the seatbelts could be attached and he did not determine feasibility for *every* seat in the bus.

Pauls said that he could have used other comparable available Australian seats with his retrofit analysis. Also, Pauls was not requested to develop a seat and seatbelt system—his sole task was to create a retrofit concept design for the MCI bus to support such a seat and seatbelt system—and Noel Dabelstein, the leading Australian manufacturer of bus seats with three-point seatbelts, testified that bus seats with three-point seatbelts were commercially available for purchase by American bus manufacturers as early as 1994 and that the installation of seatbelts on motor coaches did not require significant changes in bus structure or design. The Plaintiffs also submitted evidence that, by 1996, other bus manufacturers were selling buses equipped with three-point seatbelts, and the following countries had begun requiring seatbelts in motor coaches: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Ireland, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom.

Virgil Hoogestraat, MCI's Vice President of Engineering, essentially conceded the economic and

technological feasibility of installing a three-point seatbelt system on the bus in question:

> Q. . . . certainly there's nothing from an engineering feasibility standpoint that would stand as an insurmountable barrier for getting seat belts in passenger buses. That could be done?
>
> A. We could do that if we were required to do that.
>
> Q. All right. Or if you chose to do it?
>
> A. If we knew we should be doing that, we would do it.
>
> Q. Okay. So it's not financial or engineering feasibility that's the issue; it is truly a question of MCI saying we are not convinced and we have not yet been convinced that putting seat belts in our buses for our passengers' use would be of a safety benefit to them?
>
> A. I do not know nor have I been involved in anything where somebody said this would be beneficial.
>
> Q. All right. But my question is: It is not now nor has it ever been a situation where MCI says we don't put seat belts in our buses because we can't figure out how to do it or we don't want to pay for it. MCI has always been of the position that says the reason we're not putting seat belts in our buses is because we

> are not convinced that there would be a benefit to our passengers by having them?
>
> A. Yes, sir.

And while Robert Kadlec, MCI's bus structure expert, disagreed with Pauls' retrofit concept design, he admitted that "engineeringwise, a motor coach could be built with three-point seat belts."

Pauls admittedly did not create drawings or a prototype for crash-testing, nor did he design the actual three-point seatbelt system that would be installed in his concept retrofit design. Pauls also admittedly did not create his retrofit design for the entire bus; he did it for only one-third of the bus structure, explaining that his focus was to create and mathematically test a retrofit for the largest bracket in the bus structure to determine the cost (economic) and weight (technological) feasibility of his concept.

With regard to Pauls's retrofit concept design, the Plaintiffs did not have to build and test a prototype to prove a safer alternative design. *Sanchez,* 997 S.W.2d at 592. "A design need only prove 'capable of being developed.'" *Id.* (quoting *Boatland,* 609 S.W.2d at 748). "The *Restatement (Third) of Torts: Products Liability* takes the position that 'qualified expert testimony on the issue suffices, even though the expert has produced no prototype, if it reasonably supports the conclusion that a reasonable alternative design could have been practically adopted at the time of sale.'" *Id.* (citing RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f (1998)). Pauls's

retrofit concept design is some evidence that reasonably supports the conclusion that a safer alternative design of the MCI bus was capable of being developed.

Based on the foregoing—and viewing Pauls's testimony and the other noted evidence in the light most favorable to the verdict—we conclude that there is at least some evidence, more than a scintilla, of the existence of a safer alternative design with respect to the installation of three-point seatbelts in the MCI bus at issue.

### *3. Installing Seatbelts Would Protect Greatest Number*

MCI next asserts that there is no evidence "that seatbelts would be the most effective safety system in all bus accidents." MCI concedes that seatbelts offer the best protection for bus rollovers (and "tip-overs") while pointing to cross-examination testimony of one of the Plaintiffs' experts, Anil Khadilkar, Ph.D., a transportation safety expert, that rollovers and tip-overs occur far less frequently than do front, rear-end, and side-impact collisions. MCI also points to Dr. Khadilkar's agreement that passengers on some motor coaches socialize while traveling and if a passenger is socializing (*e.g.*, turning in her seat to talk to another passenger sitting behind her) while wearing a three-point seatbelt and a front, rear-end, or side-impact collision occurs, the seatbelted passenger can be injured by wearing the seatbelt improperly

because she is out of position at the time of the collision.[9] Thus, MCI concludes, there is legally insufficient evidence that the use of seatbelts would protect against the greatest risk to the greatest number of people.

"[A] plaintiff complaining of a design defect is required to show that 'the safety benefits from its proposed design are foreseeably greater than the resulting costs, including any diminished usefulness or diminished safety'—that is, that the alternative design not only would have reduced the risk of harm in the instant case, but also would not, 'under other circumstances, impose an equal or greater risk of harm.'" *Norman,* 104 S.W.3d at 605 (quoting *Uniroyal Goodrich Tire Co. v. Martinez,* 977 S.W.2d 328, 337 (Tex. 1998)); *see also General Motors Corp. v. Harper,* 61 S.W.3d 118, 125 (Tex. App.—Eastland 2001, pet. denied) (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 16 cmt. b (1998)) ("the alternative to the product design must increase the overall safety of the product. It is not sufficient that the alternative design would have reduced or prevented the harm the plaintiff suffered if the alternative would introduce into the product other dangers of equal or greater magnitude.")

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[9] Dr. Khadilkar added that the risk of an "out-of-position" seatbelt injury is far less in a bus than in a car because cars have such a lower mass.

The Plaintiffs argue that the safety benefit of seatbelts in buses is partly intuitive; we agree with that sentiment. The Plaintiffs also put into evidence numerous scientific studies and papers concluding that seatbelts increase safety for motor coach passengers, and several witnesses, including Dabelstein, Dr. Khadilkar, Dr. Joseph Burton (a forensic pathologist), and Dr. John Lenox (a physician and a biomechanical engineer) testified that passenger seatbelts in motor coaches significantly increase occupant safety and provide the best occupant protection in any crash scenario. Dr. Khadilkar said that a motor coach with three-point seatbelts is not more dangerous and that to his knowledge, no scientific study has concluded that three-point seatbelts make motor coaches more dangerous. MCI's Hoogestraat was also unaware of any such articles or studies.

Dr. Khadilkar also testified about NHTSA's testing of school buses that compared compartmentalization with seatbelts, and although seatbelts were not mandated for school buses because of policy reasons unique to school buses, the testing showed that three-point seatbelts provided superior occupant protection. We conclude that there is at least some evidence, more than a scintilla, that three-point seatbelts not only would have reduced the risk of harm in the instant case, but also would not, under other circumstances, impose an equal or greater risk of harm.

### *B. Producing Cause—Failure to Install Seatbelts*

With respect to Melvin Akers, who was ejected and killed in the accident, MCI asserts that the undisputed evidence shows that he would not have been saved by a seatbelt, pointing to testimony of Dr. Burton, the Plaintiffs' causation expert. Dr. Burton first testified that a three-point seatbelt would not have prevented Akers's head and upper torso from being ejected if the window glass did not stay in place: "the only way to guarantee that Melvin Akers survives this is that Melvin Akers has a restraint on, belt restraint, and Melvin Akers has a glass of some type that stays inside the window to prevent his head, which is going to be right up against the window opening, from going out of the bus when it rolls over." He later opined that Akers would not have died or sustained serious injury if he had been restrained by a three-point seatbelt or if the glass had not come out. There is at least some evidence, more than a scintilla, that the failure to install three-point seatbelts was a producing cause of Akers's death.

MCI next asserts that for Judy Benson, Jim Freeman (whose wife was killed in the accident), Elaine Horton, Alan Horton, and Robert Kuryla, there is legally insufficient evidence that, had they been wearing seatbelts, they would have suffered less severe injuries. Dr. Burton admitted that had they been wearing seatbelts, he could not say that they would not have been injured to the extent that they were, but he qualified that by adding that seatbelts

would have decreased but not eliminated their soft-tissue injuries. There thus is at least some evidence, more than a scintilla, that the failure to install three-point seatbelts was a producing cause of the personal injuries of Judy Benson, Jim Freeman, Elaine Horton, Alan Horton, and Robert Kuryla.

### *C. Producing Cause—Failure to Install Laminated Glass*

Finally, MCI contends that there is no evidence that the failure to install laminated glass was a producing cause of the Plaintiffs' injuries. MCI's sole basis for this contention is that, because the laminated-glass windshield of the bus completely came out, laminated-glass passenger windows also would have come out, and thus there is no evidence that the failure to install laminated-glass passenger windows could have been a producing cause of the injuries and deaths of the passengers who were ejected.

In the motor vehicle industry, laminated glass is often referred to as "occupant retention glazing." The Plaintiffs' glazing expert, Herbert Yudenfriend, testified that laminated glass is composed of two panes of glass with a supporting internal layer of polyvinyl butyral (PVB). He explained that because of the PVB layer's strength, the glass retains its penetration resistance and occupant-retention characteristics even when the actual glass breaks. Yudenfriend stated that rubber gaskets had been used to attach the laminated windshield in the MCI bus, and he

opined that bonding or gluing should have been used. We thus agree with the Plaintiffs that there is some evidence that bonded laminated side-passenger windows could have prevented occupant ejection in the accident.

In conclusion, we overrule MCI's legal sufficiency complaints in its fourth and fifth issues.

## IV. Proportionate Responsibility

We now turn to MCI's first issue, which asserts that the trial court abused its discretion and committed harmful error by not submitting questions to the jury concerning the bus driver's or his employer's proportionate responsibility as "settling parties" or as "responsible third parties."

### *A. Responsible Third Parties*

We begin with MCI's assertion that the trial court erred in not submitting to the jury the proportionate responsibility of Cummings or Central Texas as "responsible third parties" under the applicable version of Chapter 33 of the civil practice and remedies code.[10] *See* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 972–73

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[10] This case is governed by the version of chapter 33 in effect before July 1, 2003 because this action was filed before that date. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 4.05, 23.02(c), 2003 Tex. Gen. Laws 847, 856, 899.

(amended 2003) (current version at TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.003, 33.004, 33.011(6) (Vernon Supp. 2007)). Because that version required MCI to actually join Cummings and Central Texas as responsible third parties,[11] we agree with the Plaintiffs that MCI's complaint is actually an attack on the trial court's denial of MCI's motion for leave to join Cummings and Central Texas as responsible third parties. We review that denial for abuse of discretion. *See In re Arthur Andersen*, 121 S.W.3d 471, 483–85 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

The first of the Plaintiffs' suits against MCI was filed on June 26, 2003, and MCI answered on August 14. More than eighteen months later, and on the day limitations would have expired—February 14, 2005, MCI filed a motion for leave to join Cummings and Central Texas as responsible third parties. At that time, trial was set for August 1, 2005, but MCI did not seek a hearing on its motion for leave until late

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[11] *See In re Grant Thornton, L.L.P.*, 2004 WL 114978, at *2 (Tex. App.—Houston [14th Dist.] Jan. 26, 2004, no pet.) (mem. op.) ("The express language of the Proportionate Responsibility Statute in effect for this case requires that responsible third parties be joined in the lawsuit, not simply named or designated. . . . Sub-sections 33.004(d) and (e) also use the word "join" and discuss filing a third party claim to bring responsible third parties into a lawsuit."); *see id.* at n.2 ("Because this action was filed before July 1, 2003, relator was required to serve responsible third parties.").

June, and the hearing in which the trial court denied MCI's motion for leave took place on July 15.[12]

Because MCI waited until the eve of trial to seek to join Cummings and Central Texas as responsible third parties,[13] we cannot say that the trial court abused its discretion in denying MCI's motion for leave to join Cummings and Central Texas as responsible third parties. *See In re Arthur Andersen*, 121 S.W.3d at 483 ("The court may indeed consider whether joinder will delay the trial. However, the key is whether a delay is reasonable under the facts and circumstances of the suit, keeping in mind the history of the suit, and not simply that a delay will occur.") (citing and quoting TEX. R. CIV. P. 37 (allowing additional parties to be brought in "but not at a time or in a manner to *unreasonably* delay the trial of the case")). We hold that because Cummings and Central Texas were not properly joined by MCI as responsible third parties, the trial court did not abuse

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[12] Moreover, in the five-month period after filing its motion for leave, MCI appears to never have served Cummings and Central Texas with MCI's third-party petition joining them as responsible third parties. *See, e.g., In re Grant Thornton*, 2004 WL 114978, at *2 ("Because relator's designated responsible third parties were never served with a petition and citation, they were not parties to the suit at the time the court purportedly struck them."). The Plaintiffs additionally assert that this lack of due diligence raised a statute of limitations problem for MCI as to Cummings and Central Texas.

[13] The Plaintiffs note that as of July 15, the parties were engaged in final trial preparation, discovery had closed, and trial was scheduled to begin in two weeks.

its discretion in refusing to submit to the jury their proportionate responsibility as "responsible third parties."

### *B. "Settling Person"*

Finally, we address whether Central Texas (we include Cummings within Central Texas for this issue) is a "settling person" whose proportionate responsibility should have been submitted to the jury. We review the trial court's refusal of MCI's request to include Central Texas as a "settling person" in a proportionate responsibility question in the jury charge for abuse of discretion. *See In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000); *Omega Contracting, Inc. v. Torres*, 191 S.W.3d 828, 837 (Tex. App.—Fort Worth 2006, no pet.). The trial court is afforded broad discretion, but only so long as the charge is legally correct. *Rodriguez*, 995 S.W.2d at 664.

#### *1. The Bankruptcy Proceedings*

Next, we outline the complex factual and procedural history relating to the Plaintiffs' claims and recoveries in the Central Texas bankruptcy proceeding. On April 11, 2003—just two months after the accident—the Central Texas entities filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Western District of Texas. Cummings filed a Chapter 7 bankruptcy petition shortly thereafter. At a hearing on Central Texas' motion to extend the stay in regard to its liability insurance

carrier, the bankruptcy court determined that Central Texas' liability insurance policy and its proceeds were property of Central Texas' bankruptcy estate and ordered a stay as to any claimant's actions to recover on a claim against that policy or its proceeds; it also ordered the insurer, which was not disputing coverage for the crash, from accepting any settlement demands or paying any claims out of the proceeds without prior authority of the bankruptcy court.

On the motion of the family and estate of the victims in the SUV (the Dobelbowers) that had collided with the MCI bus, on June 30 the bankruptcy court ordered Central Texas' liability insurer to pay its $5 million policy limits into the bankruptcy court's registry and ordered that the funds be held in an interest-bearing account. The principal ground for that motion was to have the $5 million policy limits placed in an interest-bearing account because the bus-crash claimants' damages would greatly exceed $5 million and the accrual of interest would be somewhat helpful for the victims. Motions were also filed calling for the bankruptcy court to order various forms of ADR to allocate the $5 million among the numerous claimants (including the Plaintiffs, who filed proofs of claims against the Central Texas entities), and the bankruptcy court first ordered nonbinding mediation, which had already been set up and scheduled by many of the claimants. The mediation resulted in an apportionment schedule in which

each claimant was assigned a specific percentage of the insurance proceeds,[14] and on October 21, 2003, the bankruptcy court granted a motion by some of the Plaintiffs for an order approving the Apportionment Plan, which included a Litigation Plan.

### *2. The Apportionment Plan*

The Apportionment Plan provided that the "Bus Crash Claimants" (which included the Plaintiffs) "may elect to accept the percentage of the Liability Fund [the $5 million insurance proceeds and accrued interest] specifically assigned to that individual's claims by the mediator as set forth in the Apportionment Schedule." It also provided: "Any Bus Crash Claimants may elect to decline acceptance of the percentage of the Liability Fund specifically assigned to that individual's claim in the Apportionment Schedule," in which case the claimant "will be bound by the terms and conditions of the Litigation Plan." Some of the bus passengers accepted the mediator's assigned percentages and were paid under the apportionment schedule, but all of the Plaintiffs chose to have their claims against Central Texas and Cummings resolved under the Litigation Plan. About one-half of the $5 million was allocated in the Apportionment Plan; the other half was held for those participating in the Litigation Plan.

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[14] For example, Appellee James Hinton was assigned 6.5010% of the insurance proceeds.

### *3. The Litigation Plan*

Under the Litigation Plan, the claimants were to try their cases to a verdict before a special judge and under procedural rules agreed upon by all the participants. The claimants were to recover from the fund left over after payment of the apportionment claims, which was approximately $2.5 million and was termed the Litigation Fund. Their recovery was capped at 110% of the percentage assigned by the mediator.

The Litigation Plan provided:

> 4) Each participant in the Litigation Plan agrees that any recovery from the Litigation Fund will necessitate that the claimant prove by a preponderance of the evidence the following factual issues:
>
> a. that the negligence of Central Texas Trails, Inc., Kincannon Enterprises, Inc., Central Texas Bus Lines, Inc., or Johnny M. Cummings was a proximate cause of the participant's injuries and/or damages; and
>
> b. the amount of damages suffered by the claimant as a result of that negligence.

Neither the Litigation Plan nor the bankruptcy court's approval order included a schedule or deadlines for the Plan's implementation and disposition. In October 2004, after having confirmed Central Texas' reorganization plan, the bankruptcy court

entered a final decree closing the bankruptcy case, even though nothing had occurred under the Litigation Plan.

The Plaintiffs' case against MCI was tried in October 2005.[15] In offers of proof, MCI elicited testimony from many of the Plaintiffs about their proofs of claims against Central Texas in the bankruptcy case. The Plaintiffs testified that they had not made claims in the bankruptcy case against Central Texas, that they did not blame Cummings for the accident, and that they were not aware of the details of the Apportionment Plan. After the trial, Donnie Hagans, a claimant who had accepted payment under the Apportionment Plan, filed a motion in the bankruptcy court "to withdraw, strike or deny" the Plaintiffs' proofs of claims based on their inconsistent offer-of-proof testimony.

The bankruptcy court held show-cause hearings in January 2006 on these motions and noted significant flaws in the Litigation Plan: it did not contain a provision for getting money paid out of the Litigation

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[15] Before trial, in September 2005, MCI and its affiliate companies who were creditors in Central Texas' bankruptcy had filed a motion to reopen the bankruptcy case and a motion to enforce the Litigation Plan, complaining that no action had taken place to implement the Litigation Plan. MCI contended that the Plaintiffs should be prohibited from obtaining a double recovery—one from the Litigation Plan and one from the state-court suit against MCI—and that, should the Plaintiffs obtain a judgment against MCI, it should receive a credit for any amounts received by the Plaintiffs under the Litigation Plan.

Fund; it did not provide for the disposition of any leftover funds; and it had no deadlines or schedules. Thereafter, the Plaintiffs agreed on a "Special Judge," and the bankruptcy court ordered the Bus Crash Claimants (the Plaintiffs) to submit evidence to the Special Judge by February 6, 2006 and to appear on that date at the office of one of the attorneys for several of the Plaintiffs to present oral argument or testimony before the Special Judge. Central Texas was given the opportunity to appear before and submit evidence to the Special Judge; MCI was not. The Special Judge was given until March 15, 2006 to render a verdict and report and file them with the bankruptcy court. The order included the following stipulation:

> The Litigation Plan Participants [the Plaintiffs] will not move for judgment on the state court verdict prior to the final approval of disbursements, if any, to the Litigation Plan Participants in the Bankruptcy Court absent extenuating circumstances. The Litigation Plan Participants will not oppose a motion filed by Motor Coach in the state court action for credits on the judgment based upon the "one satisfaction rule" as a result of the receipt of any funds disbursed to them from the Litigation Plan. *However, the Litigation Plan Participants will oppose any motion filed by Motor Coach Industries which seeks to deem funds disbursed form* [sic] *the Litigation Fund to be "settlement credits," or a settlement under Chapter 33 of the Texas*

*Civil Practice and Remedies Code.* [Emphasis added.]

The Special Judge rendered a "Special Verdict, Report and Recommendation" after conducting the February 6 "hearing." It included a recitation of all of the materials that the Special Judge had reviewed (including the reporter's record in this case) and a listing of the parties appearing on February 6. No one appeared on behalf of Central Texas or Cummings. The Special Judge made the following liability "finding":

> Based on the materials I have reviewed, it is my determination that the negligence of the bus driver, Mr. Johnny Cummings, was a proximate cause of the accident that produced the Participants' [Plaintiffs'] injuries and damages. I further find that Mr. Cummings was acting within the course and scope of his duties for one or more Debtors [Central Texas]. Therefore, under Texas law, one or more Debtors are vicariously liable for his negligence.
>
> I have not endeavored, based upon my understanding of my duties under this Court's Order, to make a complete or comparative assessment of all parties potentially liable for causing either the accident or the resulting damages.

The Special Judge adopted the MCI trial's jury findings as a cap on the damages award and then made a slight adjustment to the percentages found by

the mediator. The bankruptcy court approved the Special Judge's finding, and each Plaintiff received within 2% of the amount allocated in the Apportionment Plan, except for Robert Kuryla, whose award was reduced because the jury had awarded him less than his allocation.

MCI then moved the trial court for a settlement credit for the Central Texas insurance monies paid to the Plaintiffs from the bankruptcy court. But rather than giving a settlement credit, the trial court recited in the final judgment that it has been "partially satisfied" as to each Plaintiff in the exact amount that each had received from the Litigation Fund.

### *4. Chapter 33*

As noted above, the statutory scheme under the 1995 version of Chapter 33 applies to this case. It applied to a broad range of cases, including "any cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought." Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 971 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 33.002 (Vernon Supp. 2007)). Former section 33.003 provided that the trier of fact shall determine the percentage of responsibility for each claimant, each defendant, each *settling person,* and each responsible third party who has been joined under section 33.004. *Id.* at 1995 Tex. Gen. Laws 971, 972–73 (amended 2003) (current

version at TEX. CIV. PRAC. & REM. CODE ANN. § 33.003 (Vernon Supp. 2007)); *see also* TEX. R. CIV. P. 277 (requiring trial court to submit jury question when loss is to be apportioned). "Settling person" was defined by former section 33.011(5) as "a person who at the time of submission has paid or promised to pay money or anything of monetary value to a claimant at any time in consideration of potential liability . . . for which recovery of damages is sought." Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.07, 1987 Tex. Gen. Laws 37, 41 (amended 1995 and 2003) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 33.011(5) (Vernon Supp. 2007)).

Former section 33.013 provided, with certain exceptions, that a defendant was liable only for the percentage of responsibility found by the trier of fact, unless the percentage of responsibility exceeded fifty percent, in which case that defendant was jointly and severally liable for all of the claimant's recoverable damages.[16] It was therefore plainly in MCI's interest to have Central Texas' conduct (or that of Cummings, for whom Central Texas was vicariously liable) submitted to the jury to reduce MCI's percentage of responsibility, if any, and at a minimum to determine if its percentage of responsibility was under 51%, which would allow it to avoid joint and

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[16] Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3271 (amended 1987, 1995, and 2003) ((current version at TEX. CIV. PRAC. & REM. CODE ANN. § 33.013 (Vernon Supp. 2007)).

several liability for all of the Plaintiffs' damages. Conversely, because Central Texas was in bankruptcy, it was in the Plaintiffs' interest to have MCI found 100%, or at least 51%, responsible.

### *5. Discussion and Analysis*

Based on the above, we now must determine whether Central Texas was a "settling person" under Chapter 33. That is, we address whether or not the Litigation Plan was a "settlement" between Central Texas and the Plaintiffs such that Central Texas was a "settling person" whose proportionate responsibility should have been submitted to the jury along with that of MCI. *See C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 320 (Tex. 1994) ("'settlement', as used in the Comparative Responsibility Law, means money or anything of value paid or promised to a claimant in consideration of potential liability").

As a threshold matter, we review MCI's contention that legally sufficient evidence supported the submission of Central Texas' proportionate responsibility. In addition to the statutory definition of settling person, former section 33.002(f) also required sufficient evidence to support the submission of that person's conduct in a proportionate responsibility question. Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 972 (amended 2003) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 33.003(b (Vernon Supp. 2007)). We review that person's conduct for legal sufficiency. *Olympic Arms,*

*Inc. v. Green*, 176 S.W.3d 567, 573 (Tex. App.—Houston [1st Dist.] 2004, no pet.). MCI points to evidence that Cummings was driving too fast, that he drove the bus into head-on traffic, and that the tread on one of the rear bus tires was too thin for the wet road conditions. The Plaintiffs make no argument that the evidence was legally insufficient. We conclude that there is some evidence to support the submission of Central Texas' conduct in a proportionate responsibility question.

We begin our settling-person analysis by noting that the Plaintiffs asserted tort claims against Central Texas in their bankruptcy proofs of claims. MCI asserts that Central Texas' liability insurer's tender of the $5 million policy limits to the bankruptcy court was a payment to the Plaintiffs in consideration of Central Texas' potential liability. The Plaintiffs argue that the money was tendered not to them, but to the bankruptcy court, and only because the bankruptcy court ordered it. That is only partially correct.

It is apparent from the various bankruptcy court documents (particularly the Dobelbowers' various motions relating to the $5 million policy proceeds and ADR procedures and the other parties' motions and responses relating to ADR) that all of the parties—the Bus Crash Claimants, Central Texas, and its liability insurer—were engaged in extensive, detailed discussions and negotiations over the $5 million and its fair division among all the claimants. Additionally, it appears that neither Central Texas nor its insurer

opposed tendering the $5 million or participating in ADR proceedings to apportion the $5 million.[17]

Moreover, Central Texas' Second Amended Plan of Reorganization, which the Plaintiffs voted for and which the bankruptcy court approved, delineated the Bus Crash Claimants as a class of creditors with wrongful death and personal injury damages against Central Texas arising out of the crash and provided: "The Debtor [Central Texas] shall pay $7,000 annually to this class of creditor for five years." These payments began in 2004 and went partly into the Litigation Fund to be distributed under the Litigation Plan. We are now led to the crucial aspect of our inquiry: Did the Litigation Fund, which consisted of half of the insurance proceeds and Central Texas' direct annual payments, and the Litigation Plan, through which each Plaintiff's claim for a percentage of the Litigation Fund was "adjudicated," constitute payments *to the Plaintiffs* in consideration of potential liability and thereby render Central Texas a "settling person"? (Or more broadly, was the Litigation Plan a settlement between Central Texas and the Plaintiffs?) We answer "yes."

The tender of the $5 million to the bankruptcy court (half of which went to the Litigation Fund) and

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[17] The only major dispute between the Bus Crash Claimants and Central Texas and its insurer was whether the claimants would have to fully release Central Texas, Cummings, and the insurer.

Central Texas' direct annual payments to the Litigation Fund, were indirect payments to the Plaintiffs in consideration of Central Texas' potential liability to the Plaintiffs, and the subsequent payments from that fund to the Plaintiffs were not contingent on the outcome of an adversarial or uncertain proceeding. *Cf. Gilcrease v. Garlock, Inc.*, 211 S.W.3d 448, 452–55 (Tex. App.—El Paso 2006, no pet.) (holding that post-settlement bankruptcies of settling parties did not make settlements contingent and that defendant was entitled to credits, even though settlements had not been paid, and distinguishing settlements contingent on other litigation and uncertain bankruptcy proceedings) (citing *McNair v. Owens-Corning Fiberglas Corp.*, 890 F.2d 753 (5th Cir. 1989), and *Cimino v. Raymark Indus.*, 751 F. Supp. 649 (E.D. Tex. 1990), *aff'd in part, vacated in part on other grounds*, 151 F.3d 297 (5th Cir. 1998)).

The Plaintiffs contend that, because the hearing before the Special Judge and the bankruptcy court's order approving the Special Judge's report and the disbursements to the Plaintiffs occurred several months after the trial against MCI, there had been no adjudication or disbursements—no payments or promises to pay-out of the Litigation Fund at the time the case was submitted to the jury in the MCI trial. The statute, however, defines a settling person as one who pays or promises to pay "at any time." Thus, we give no weight to the timing of the Litigation Plan's

hearing, verdict, and actual disbursements;[15] as of the time of submission of this case to the jury, the Litigation Plan had been in place for over two years. We also give no credence to the *ipse dixit* statement in Central Texas' reorganization plan that "[s]ome of the bus crash claimants [the Plaintiffs] have not settled their claims against the Debtors [Central Texas]" and continue to be participants in the Litigation Plan.

The Plaintiffs' other arguments for why the Litigation Plan was not a settlement are that their claims against Central Texas were not settled, but were "adjudicated" under the bankruptcy court's orders (*via* the Litigation Plan), that they were required to prove Central Texas' negligence and their damages to the Special Judge to receive money from the Litigation Fund, and that they were exposed to receiving less money than originally allocated to them by the mediator. We are not persuaded.

Although the bankruptcy court entered an order approving the Litigation Plan, that plan was prepared by and agreed to by the Plaintiffs. Extensive negotiations took place before and after the mediation

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[15] We acknowledge MCI's note on the treatment that the trial court's final judgment gives to the Litigation Fund payments to the Plaintiffs—as partial satisfactions of the judgment, rather than as settlement credits. But Central Texas was not a party to the judgment and thus could not have partially satisfied it, and these payments came from the Litigation Plan and were funded by Central Texas and its liability insurer in consideration of Central Texas' potential liability.

in which all the Bus Crash Claimants, including the Plaintiffs, agreed to an apportionment schedule in which each claimant was assigned a specific percentage of the Litigation Fund. Negotiations with Central Texas and its insurer also took place, and in its reorganization plan, Central Texas agreed to pay $7,000 a year for five years to benefit the Litigation Fund. The Plaintiffs, as a class of creditors, voted for this plan, which also included a provision discharging Central Texas from all debts, including the Plaintiffs' tort claims.

The Litigation Plan was structured to make the payments from the Litigation Fund to the Plaintiffs appear to be contingent on an adjudicative proceeding, but piercing it reveals no adversarial adjudication or uncertainty to render it contingent, and it has several indicia of a settlement. *Cf. Turoff*, 222 S.W.3d at 668 ("But the law on Mary Carter Agreements in Texas has evolved to include agreements that violate the principles laid out in *Elbaor* even if the precise structure of the agreement does not fit the precise pattern of an agreement previously determined to be in violation of public policy."). The money paid into the Litigation Fund was apparently nonrefundable, and thus unconditional; *i.e.*, nothing provided for its return or other disposition if the Plaintiffs did not prove the negligence of Central Texas or Cummings to the Special Judge. The Litigation Fund was plainly earmarked to be distributed to the Plaintiffs in the approximate percentages agreed to at the 2004 mediation. We have no reason to believe that the Special

Judge acted other than in good faith, but the "hearing" before him was not adversarial. No interested parties (*e.g.*, Central Texas, Cummings, or MCI) participated to argue that Central Texas and Cummings were not negligent or to contest the Plaintiffs' injuries or the amount of their damages.[19] The payments that were to be made to the Plaintiffs as a result of the proceeding before the Special Judge were not contingent so as to render the Litigation Plan not a settlement for purposes of Chapter 33.

We summarize: As a result of the crash, Central Texas was potentially liable to the Plaintiffs; all of Central Texas' liability insurance proceeds were earmarked for the crash victims, and half of those proceeds, along with direct payments from Central Texas, were placed in a fund to be allocated among the Plaintiffs under procedures set up and controlled by the Plaintiffs with no adversary; the Plaintiffs voted for Central Texas' reorganization plan, which discharged all of Central Texas' debts, including its debts for the Plaintiffs' tort claims; all of the Plaintiffs received the approximate apportionment percentages that had been agreed to at the original mediation; and the payments were made to the Plaintiffs plainly in consideration of Central Texas'

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[19] We view the Litigation Plan as a good-faith, albeit unsuccessful, *attempt* to avoid the possible detriment to the Plaintiffs if Central Texas' proportionate responsibility were submitted to the jury. Indeed, it had the stamp of approval of the bankruptcy court.

potential liability to them. This process was hardly a typical tort settlement, but it was a settlement and Central Texas was a settling person for purposes of Chapter 33. For these reasons, we hold that Cummings and Central Texas were "settling persons" under Chapter 33 and that the trial court erred in refusing MCI's request to submit their proportionate responsibility to the jury. *See Omega Contracting*, 191 S.W.3d at 837; *Olympic Arms*, 176 S.W.3d at 575.

We last address whether the trial court's error was harmful and warrants reversal. A reversal is warranted if the trial court denies a proper submission of a settling person's proportionate responsibility, and the error probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1; *Olympic Arms*, 176 S.W.3d at 576.

We found above that there was legally sufficient evidence of Central Texas' and Cummings's negligence. It is thus probable that the jury would have placed some of the responsibility on them, and if MCI's proportionate responsibility were found to be less than 51%, it would have been liable for only its percentage of responsibility. Because the trial court's erroneous refusal to submit Central Texas or Cummings caused MCI to be 100% liable, that error was reasonably calculated to cause, and probably caused, the rendition of an improper judgment. *See Olympic Arms*, 176 S.W.3d at 576. We sustain in part MCI's first issue.

## V. Issues Not Addressed

Because of our disposition of MCI's first issue, we will not address MCI's factual sufficiency complaints in issues four and five, nor will we address MCI's second (refusal to permit cross-examination) and seventh (charge error) issues. *See* TEX. R. APP. P. 47.1.

## VI. Conclusion

Having sustained in part MCI's first issue, we reverse the trial court's judgment and remand this cause for further proceedings consistent with this opinion.

BILL VANCE
Justice

Before Chief Justice Gray,
Justice Vance, and
Justice Reyna
(Chief Justice Gray dissenting)
Reversed and remanded
Opinion delivered and filed September 10, 2008
[CVPM]

[SEAL]

IN THE
TENTH COURT OF APPEALS

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No. 10-06-00256-CV

MCI SALES AND SERVICE, INC., F/K/A HAUSMAN BUS SALES, INC., AND MOTOR COACH INDUSTRIES MEXICO, S.A. DE C.V., F/K/A DINA AUTOBUSES, S.A. DE C.V.,

Appellants

v.

JAMES HINTON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DOLORES HINTON, DECEASED, DAVID HINTON, ROBERT KURYLA, KAREN KURYLA, HATTIE BINNS, RETA HAYNES, MELINDA GREGER, ALAN HORTON, ELAINE HORTON, RUTH POWELL, JUDY BENSON, JAMES L. FREEMAN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JO CATHERINE FREEMAN, DECEASED, JAMES F. FREEMAN, MELANIE JO BROOKS, SUSAN AKERS BILLS, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATES OF ROBERT MELVIN AKERS, DECEASED, AND MILDRED DELOIS AKERS, DECEASED, ROBERT MELVIN AKERS, JR., PATSY BEASLEY, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF WAYNE BEASLEY,

**DECEASED, SHIRLEY SOMMER, AND PEGGY ARMSTRONG,**

**Appellees**

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**From the 170th District Court**
**McLennan County, Texas**
**Trial Court No. 2003-2308-4**

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## DISSENTING OPINION

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The events of this case are tragic. But the state law crashworthiness design claims being made by the plaintiffs against the manufacturer of the bus are pre-empted by federal law. And in recognition of the benefits of a single regulatory entity for all states in the United States, the expanse of preemption is widening. *See Riegel v. Medtronic, Inc.*, ___ U.S. ___, 128 S.Ct. 999, 1011, 169 L.Ed.2d 892, 906–907, 2008, U.S. LEXIS 2013, *29–30 (2008) (tort claims challenging safety & effectiveness of catheter); *Carden v. General Motors Corp.*, 509 F.3d 227, 230–232 (5th Cir. 2007) (tort claims challenging design of seat belts); *Bic Pen Corp. v. Carter*, 251 S.W.3d 500, 504–509 (Tex. 2008) (common law challenge of design defect of BIC lighter). *See also Delta Air Lines, Inc. v. Black* 116 S.W.3d 745 (Tex. 2003) (challenge of airline passenger boarding procedures). The judgment of the trial court should be reversed and rendered.

I respectfully dissent.

TOM GRAY
Chief Justice

Dissenting opinion delivered and filed September 10, 2008

[SEAL]

**TENTH COURT OF APPEALS**
McLennan County Courthouse
501 Washington Avenue, Rm 415
Waco, Texas 76701-1327
Phone: (254) 757-5200 Fax: (254) 757-2822

**Chief Justice**
*Tom Gray*
**Justice**
*Bill Vance*
*Felipe Reyna*

**Clerk**
*Sharri Roessler*

September 10, 2008

In accordance with the enclosed Opinion, below is the judgment in the numbered cause set out herein to be entered in the Minutes of this Court as of the 10th day of September, 2008.

10-06-00256-CV

MCI SALES AND SERVICE, INC., F/K/A HAUSMAN BUS SALES, INC., AND MOTOR COACH INDUSTRIES MEXICO, S.A. DE C.V., F/K/A DINA AUTOBUSES, S.A. DE C.V. v. JAMES HINTON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DELORES HINTON, DECEASED, DAVID HINTON, ROBERT KURYLA, KAREN KURYLA, HATTIE BINNS, RETA HAYNES, MELINDA GREGER, ALAN HORTON, ELAINE HORTON, RUTH POWELL, JUDY BENSON, JAMES L. FREEMAN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JO CATHERINE FREEMAN, DECEASED, JAMES F. FREEMAN, MELANIE JO BROOKS,

SUSAN AKERS BILLS, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATES OF ROBERT MELVIN AKERS, DECEASED, AND MILDRED DELOIS AKERS, DECEASED, ROBERT MELVIN AKERS, JR., PATSY BEASLEY, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF WAYNE BEASLEY, DECEASED, SHIRLEY SOMMER, AND PEGGY ARMSTRONG - ON APPEAL FROM THE 170th DISTRICT COURT OF McLENNAN COUNTY—TRIAL COURT NO. 2003-2308-4 - REVERSED AND REMANDED — Opinion by Justice Vance; Chief Justice Gray dissenting:

"This cause came on to be heard on the transcript of the record, and the same being considered, because it is the opinion of this Court that there was error in the judgment of the court below; it is therefore ordered, adjudged and decreed that the judgment of the court below be, and hereby is, reversed and this cause is remanded to the 170th District Court of McLennan County, Texas, in accordance with the opinion of this Court. It is further ordered that Appellees pay costs of appeal and that this decision be certified below for observance."

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NO. 2003-2308-4

| | | |
|---|---|---|
| JAMES HINTON, et al., | § | IN THE DISTRICT |
| | § | COURT OF |
| v. | § | |
| | § | McLENNAN COUNTY, |
| MOTOR COACH | § | TEXAS |
| INDUSTRIES INTERNA- | § | |
| TIONAL, INC., et al. | § | 170TH JUDICIAL |
| | § | DISTRICT |

**FINAL JUDGMENT**

(Filed May 24, 2006)

On October 5, 2005, this case was called for trial. Plaintiffs and Intervenors James Hinton, Individually and as Representative of the Estate of Dolores Hinton, Deceased; David Hinton; Robert Kuryla; Karen Kuryla; Hattie Binns; Reta Haynes; Melinda Greger; Alan Horton; Elaine Horton; Ruth Powell; Judy Benson; James L. Freeman, Individually and as Personal Representative of the Estate of Jo Catherine Freeman, Deceased; James F. Freeman; Melanie Jo Brooks; Susan Akers Bills, Individually and as Executrix of the Estates of Robert Melvin Akers, Deceased, and Mildred Delois Akers, Deceased; Robert Melvin Akers, Jr.; Patsy Beasley, Individually and as Executrix of the Estate of Wayne Beasley, Deceased; Shirley Sommer; and Peggy Armstrong (collectively "Plaintiffs") appeared in person and through their attorneys and announced ready for trial. Defendants Motor Coach Industries, Inc., Motor Coach Industries International, Inc., MCH Holdings (USA), Inc., MCI Sales and Service, Inc. f/k/a Hausman Bus Sales, Inc.,

and Motor Coach Industries Mexico, S.A. de C.V., f/k/a Dina Autobuses, S.A. de C.V. appeared through their representatives and through their attorneys and announced ready for trial.

A jury of twelve members was impaneled and sworn, and it heard the evidence and arguments of counsel. Pursuant to a stipulation between Plaintiffs and Defendants, Plaintiffs' claims against Defendants Motor Coach Industries, Inc., Motor Coach Industries International, Inc., and MCII Holdings (USA), Inc. were dismissed. At the conclusion of the evidence, the Court submitted the questions of fact in the case to the jury. In response to the jury charge, the jury made findings that the Court received, filed and entered of record. The Court's charge and the jury's findings are attached as Exhibit 1 and incorporated by reference for all purposes.

Plaintiffs moved for judgment on the verdict. Because it appears to the Court that the verdict of the jury was for the Plaintiffs and against Defendants MCI Sales and Service, Inc. f/k/a Hausman Bus Sales, Inc., and Motor Coach Industries Mexico, S.A. de C.V., f/k/a Dina Autobuses, S.A. de C.V. (hereinafter, collectively "Defendants"), judgment should be rendered on the verdict in favor of Plaintiffs and against Defendants.

The Court hereby RENDERS judgment for Plaintiffs and Intervenors and ORDERS that Plaintiffs and Intervenors have and recover actual damages from Defendants MCI Sales and Service, Inc. f/k/a

Hausman Bus Sales, Inc., and Motor Coach Industries de Mexico, S.A. de C.V., f/k/a Dina Autobuses, S.A. de C.V., jointly and severally, as follows:

1. **Judgment for James Hinton, Individually and as Representative of the Estate of Dolores Hinton, Deceased:**

   a. Funeral and burial expenses for the Estate of Dolores Hinton, Deceased, in the amount of $9,161.37;

   b. Pecuniary loss in the past: $35,000.00;

   c. Pecuniary loss in the future: $200,000.00;

   d. Loss of companionship and society in the past: $540,000.00;

   e. Loss of companionship and society in the future: $540,000.00;

   f. Mental anguish in the past: $540,000.00;

   g. Mental anguish in the future: $540,000.00;

   h. Pre-judgment interest on the recovery of funeral and burial expenses, at the rate of 7.75%, in the amount of $2,061.86; and

   i. Pre-judgment interest on the recovery of damages sustained in the past, at the rate of 7.75%, in the amount of $250,941.90.

The Court finds that the judgment for James Hinton, Individually and as Representative of the Estate of Dolores Hinton, Deceased, has been partially satisfied in the amount of **$331,877.61**.

Therefore, the Court ORDERS that James Hinton, Individually and as Representative of the Estate of Dolores Hinton, Deceased, have and recover **$2,325,287.52** from Defendants, jointly and severally, and post-judgment interest on the sum of **$2,325,287.52** at the rate of 7.75% per annum, compounded annually, from the date of this Judgment until paid.

2. **Judgment for David Hinton:**

   a. Loss of companionship and society in the past: $75,000.00;

   b. Loss of companionship and society in the future: $75,000.00;

   c. Mental anguish in the past: $75,000.00;

   d. Mental anguish in the future: $75,000.00; and

   e. Pre-judgment interest on the recovery of damages sustained in the past, at the rate of 7.75%, in the amount of $33,759.00.

The Court finds that the judgment for David Hinton has been partially satisfied in the amount of **$76,575.36**.

Therefore, the Court ORDERS that David Hinton have and recover **$257,183.64** from Defendants, jointly and severally, and post-judgment interest on the sum of **$257,183.64** at the rate of 7.75% per annum, compounded annually, from the date of this Judgment until paid.

3. **Judgment for Robert Kuryla:**

   a. Loss of earning capacity in the past: $1,800.00;

   b. Medical expenses in the past: $5,166.57; and

   c. Pre-judgment interest on the recovery of damages sustained in the past, at the rate of 7.75%, in the amount of $1,567.90.

The Court finds that the judgment for Robert Kuryla has been partially satisfied in the amount of **$7 062.59**.

Therefore, the Court ORDERS that Robert Kuryla have and recover **$1,471.88** from Defendants, jointly and severally, and post-judgment interest on the sum of **$1,471.88** at the rate of 7.75% per annum, compounded annually, from the date of this Judgment until paid.

4. **Judgment for Karen Kuryla:**

   a. Physical pain and mental anguish in the past: $50,000.00;

   b. Physical pain and mental anguish in the future: $75,000;

   c. Loss of earning capacity in the past: $2,560.00;

   d. Physical impairment in the past: $50,000.00;

   e. Medical expenses in the past: $26,869.32; and

   d. [sic] Pre-judgment interest on the recovery of damages sustained in the past, at the rate of 7.75%, in the amount of $29,129.36.

The Court finds that the judgment for Karen Kuryla has been partially satisfied in the amount of **$59,218.27**.

Therefore, the Court ORDERS that Karen Kuryla have and recover **$174,340.41** from Defendants, jointly and severally, and post-judgment interest on the sum of **$174,340.41** at the rate of 7.75% per annum, compounded annually, from the date of this Judgment until paid.

5. **Judgment for Hattie Binns:**

   a. Physical pain and mental anguish in the past: $25,000.00;

   b. Loss of earning capacity in the past: $315.00;

   c. Disfigurement in the past: $1,000.00;

   d. Disfigurement in the future: $5,000.00;

   e. Physical impairment in the past: $5,000.00;

   f. Medical expenses in the past: $7,809.20; and

   g. Pre-judgment interest on the recovery of damages sustained in the past, at the rate of 7.75%, in the amount of $8,805.29.

The Court finds that the judgment for Hattie Binns has been partially satisfied in the amount of **$14,947.52**.

Therefore, the Court ORDERS that Hattie Binns have and recover **$37,981.97** from Defendants, jointly and severally, and post-judgment interest on the sum

of **$37,981.97** at the rate of 7.75% per annum, compounded annually, from the date of this Judgment until paid.

**6. Judgment for Reta Haynes:**

a. Physical pain and mental anguish in the past: $99,000.00;

b. Physical pain and mental anguish in the future: $250,000.00;

c. Disfigurement in the past: $5,000.00;

d. Disfigurement in the future: $10,000.00;

e. Physical impairment in the past: $99,000.00;

f. Physical impairment in the future: $99,000.00;

g. Medical expenses in the past: $59,986.62; and

h. Pre-judgment interest on the recovery of damages sustained in the past, at the rate of 7.75%, in the amount of $59,187.77.

The Court finds that the judgment for Reta Haynes has been partially satisfied in the amount of **$153,150.72**.

Therefore, the Court ORDERS that Reta Haynes have and recover **$528,023.67** from Defendants, jointly and severally, and post-judgment interest on the sum of **$528,023.67** at the rate of 7.75% per annum, compounded annually, from the date of this Judgment until paid.

**7. Judgment for Melinda Greger:**

a. Physical pain and mental anguish in the past: $50,000.00;

b. Physical pain and mental anguish in the future: $50,000.00;

c. Loss of earning capacity in the past $7,500.00;

d. Physical impairment in the past: $25,000.00;

e. Medical expenses in the past: $10,860.87; and

f. Pre-judgment interest on the recovery of damages sustained in the past, at the rate of 7.75%, in the amount of $21,011.80.

The Court finds that the judgment for Melinda Greger has been partially satisfied in the amount of **$34,566.11**.

Therefore, the Court ORDERS that Melinda Greger have and recover **$129,806.56** from Defendants, jointly and severally, and post-judgment interest on the sum of **$129,806.56** at the rate of 7.75% per annum, compounded annually, from the date of this Judgment until paid.

**8. Judgment for Alan Horton:**

a. Physical pain and mental anguish in the past: $5,000.00;

b. Loss of earning capacity in the past: $385.00;

c. Medical expenses in the past: $122.00; and

f. [sic] Pre-judgment interest on the recovery of damages sustained in the past, at the rate of 7.75%, in the amount of $1,239.41.

The Court finds that the judgment for Alan Horton has been partially satisfied in the amount of **$801.51**.

Therefore, the Court ORDERS that Alan Horton have and recover **$5,944.90** from Defendants, jointly and severally, and post-judgment interest on the sum of **$5,944.90** at the rate of 7.75% per annum, compounded annually, from the date of this Judgment until paid.

**9. Judgment for Elaine Horton:**

a. Physical pain and mental anguish in the past: $5,000.00;

b. Physical pain and mental anguish in the future: $5,000.00;

c. Loss of earning capacity in the past: $415.68;

d. Physical impairment in the past: $5,000.00;

e. Medical expenses in the past: $4,699.86; and

f. Pre-judgment interest on the recovery of damages sustained in the past, at the rate of 7.75%, in the amount of $3,401.90.

The Court finds that the judgment for Elaine Horton has been partially satisfied in the amount of **$10,766.49**.

Therefore, the Court ORDERS that Elaine Horton have and recover **$12,750.95** from Defendants, jointly and severally, and post-judgment interest on the sum of **$12,750.95** at the rate of 7.75% per annum, compounded annually, from the date of this Judgment until paid.

**10. Judgment for Ruth Powell:**

a. Physical pain and mental anguish in the past: $250,000.00;

b. Physical pain and mental anguish in the future: $688,000.00;

c. Physical impairment in the past: $125,000.00;

d. Physical impairment in the future: $688,000.00;

e. Medical expenses in the past: $54,806.55;

f. Medical expenses in the future: $22,000.00; and

g. Pre-judgment interest on the recovery of damages sustained in the past, at the rate of 7.75%, in the amount of $96,732.26.

The Court finds that the judgment for Ruth Powell has been partially satisfied in the amount of **$254,230.19**.

Therefore, the Court ORDERS that Ruth Powell have and recover **$1,670,308.62** from Defendants, jointly and severally, and post-judgment interest on the sum of **$1,670,308.62** at the rate of 7.75% per

annum, compounded annually, from the date of this Judgment until paid.

**11. Judgment for Judy Benson:**

a. Physical pain and mental anguish in the past: $5,000.00;

b. Loss of earning capacity in the past: $146.00;

c. Medical expenses in the past: $826.00; and

d. Pre-judgment interest on the recovery of damages sustained in the past, at the rate of 7.75%, in the amount of $1,344.06.

The Court finds that the judgment for Judy Benson has been partially satisfied in the amount of **$3,777.71**.

Therefore, the Court ORDERS that Judy Benson have and recover **$3,538.35** from Defendants, jointly and severally, and post-judgment interest on the sum of **$3,538.35** at the rate of 7.75% per annum, compounded annually, from the date of this Judgment until paid.

**12. Judgment for James L. Freeman, Individually and as Personal Representative of the Estate of Jo Catherine Freeman, Deceased:**

a. Funeral and burial expenses for the Estate of Jo Catherine Freeman, Deceased, in the amount of $10,641.00;

b. Loss of companionship and society in the past: $875,000.00;

c. Loss of companionship and society in the future: $875,000.00;

d. Mental anguish in the past: $875,000.00;

e. Mental anguish in the future: $875,000.00;

f. Medical expenses in the past: $1,975.50;

g. Pre-judgment interest on the recovery of funeral and burial expenses for the Estate of Jo Catherine Freeman, Deceased, at the rate of 7.75%, in the amount of $2,394.86; and

d. [sic] Pre-judgment interest on the recovery of damages sustained in the past, at the rate of 7.75%, in the amount of $394,299.61.

The Court finds that the judgment for James L. Freeman, Individually and as Personal Representative of the Estate of Jo Catherine Freeman, Deceased has been partially satisfied in the amount of **$226,877.48**.

Therefore, the Court ORDERS that James L. Freeman, Individually and as Personal Representative of the Estate of Jo Catherine Freeman, Deceased have and recover **$3,682,433.49** from Defendants, jointly and severally, and post-judgment interest on the sum of **$3,682,433.49** at the rate of 7.75% per annum, compounded annually, from the date of this Judgment until paid.

**13. Judgment for James F. Freeman:**

a. Loss of companionship and society in the past: $86,000.00;

b. Loss of companionship and society in the future: $86,000.00;

c. Mental anguish in the past: $86,000.00;

d. Mental anguish in the future: $86,000.00; and

e. Pre-judgment interest on the recovery of damages sustained in the past, at the rate of 7.75%, in the amount of $38,710.32.

The Court finds that the judgment for James F. Freeman has been partially satisfied in the amount of **$76,575.36**.

Therefore, the Court ORDERS that James F. Freeman have and recover **$306,134.96** from Defendants, jointly and severally, and post-judgment interest on the sum of **$306,134.96** at the rate of 7.75% per annum, compounded annually, from the date of this Judgment until paid.

**14. Judgment for Melanie Jo Brooks:**

a. Loss of companionship and society in the past: $86,000.00;

b. Loss of companionship and society in the future: $86,000.00;

c. Mental anguish in the past: $86,000.00;

d. Mental anguish in the future: $86,000.00; and

e. Pre-judgment interest on the recovery of damages sustained in the past, at the rate of 7.75%, in the amount of $38,710.32.

The Court finds that the judgment for Melanie Jo Brooks has been partially satisfied in the amount of **$76,575.36**

Therefore, the Court ORDERS that Melanie Jo Brooks have and recover **$306,134.96** from Defendants, jointly and severally, and post-judgment interest on the sum of **$306,134.96** at the rate of 7.75% per annum, compounded annually, from the date of this Judgment until paid.

**15. Judgment for Susan Akers Bills, Individually and as Executrix of the Estates of Robert Melvin Akers, Deceased, and Mildred Delois Akers, Deceased:**

a. Funeral and burial expenses for the Estate of Robert Melvin Akers, Sr. in the amount of $4,263.00;

b. Funeral and burial expenses for the Estate of Mildred Delois Akers in the amount of $7,653.50;

c. Damages resulting from the death of Robert Melvin Akers, Sr.:

1) Loss of companionship and society in the past: $125,000.00;

2) Loss of companionship and society in the future: $125,000.00;

3) Mental anguish in the past: $125,000.00;

4) Mental anguish in the future: $125,000.00; and

d. Damages resulting from the death of Mildred Delois Akers:

1) Loss of companionship and society in the past: $125,000.00;

2) Loss of companionship and society in the future: $125,000.00;

3) Mental anguish in the past: $125,000.00; and

4) Mental anguish in the future: $125,000.00;

e. Pre-judgment interest on the recovery of funeral and burial expenses for the Estate of Robert Melvin Akers, Sr., Deceased, at the rate of 7.75%, in the amount of $959.43;

f. Pre-judgment interest on the recovery of funeral and burial expenses for the Estate of Mildred Delois Akers, Deceased, at the rate of 7.75%, in the amount of $1,722.50; and

g. Pre-judgment interest on the recovery of damages sustained in the past, at the rate of 7.75%, in the amount of $112,530.00.

The Court finds that the judgment for Susan Akers Bills, Individually and as Executrix of the Estates of Robert Melvin Akers, Deceased, and Mildred Delois Akers, Deceased has been partially satisfied in the amount of **$166,260.42**.

Therefore, the Court ORDERS that Susan Akers Bills, Individually and as Executrix of the Estates of Robert Melvin Akers, Deceased, and Mildred Delois Akers, Deceased have and recover **$960,868.01** from Defendants, jointly and severally, and post-judgment interest on the sum of **$960,868.01** at the rate of 7.75% per annum, compounded annually, from the date of this Judgment until paid.

**16. Judgment for Robert Melvin Akers, Jr.:**

a. Damages resulting from the death of Robert Melvin Akers, Sr.:

1) Loss of companionship and society in the past: $125,000.00;

2) Loss of companionship and society in the future: $125,000.00;

3) Mental anguish in the past: $125,000.00; and

4) Mental anguish in the future: $125,000.00;

b. Damages resulting from the death of Mildred Delois Akers:

1) Loss of companionship and society in the past: $125,000.00;

2) Loss of companionship and society in the future: $125,000.00;

3) Mental anguish in the past: $125,000.00; and

4) Mental anguish in the future: $125,000.00;

c. Pre-judgment interest on the recovery of damages sustained in the past, at the rate of 7.75%, in the amount of $112,530.00.

The Court finds that the judgment for Robert Melvin Akers, Jr. has been partially satisfied in the amount of **$153,150.72**.

Therefore, the Court ORDERS that Robert Melvin Akers, Jr. have and recover **$959,379.28** from Defendants, jointly and severally, and post-judgment interest on the sum of **$959,379.28** at the rate of 7.75% per annum, compounded annually, from the date of this Judgment until paid.

**17. Judgment for Patsy Beasley, Individually and as Executrix of the Estate of Wayne Beasley, Deceased:**

a. Medical expenses in the amount of $311,697.74 and funeral and burial expenses in the amount of $13,367.75 for the Estate of Wayne Beasley, Deceased;

b. Damages resulting from the death of Wayne Beasley:

1) Loss of companionship and society in the past: $625,000.00;

2) Loss of companionship and society in the future: $625,000.00;

3) Mental anguish in the past: $625,000.00; and

4) Mental anguish in the future: $625,000.00;

c. Damages for personal injuries:

1) Physical pain and mental anguish in the past: $10,000.00; and

2) Medical expenses in the past: $42,701.62

d. Pre-judgment interest on the recovery of medical expenses and funeral and burial expenses for the Estate of Wayne Beasley, Deceased, at the rate of 7.75%, in the amount of $73,159.24; and

d. [sic] Pre-judgment interest on the recovery of damages sustained by Patsy Beasley in the past, at the rate of 7.75%, in the amount of $293,186.03.

The Court finds that the judgment for Patsy Beasley, Individually and as Executrix of the Estate of Wayne Beasley, Deceased has been partially satisfied in the amount of **$381,222.77**.

Therefore, the Court ORDERS that Patsy Beasley, Individually and as Executrix of the Estate of Wayne Beasley, Deceased have and recover **$2,862,889.61** from Defendants, jointly and severally, and post-judgment interest on the sum of **$2,862,889.61** at the rate of 7.75% per annum, compounded annually, from the date of this Judgment until paid.

**18. Judgment for Shirley Sommer:**

a. Physical pain and mental anguish in the past: $99,000.00;

b. Physical pain and mental anguish in the future: $328,500.00;

c. Disfigurement in the past: $5,000.00;

d. Disfigurement in the future: $15,000.00;

e. Physical impairment in the past: $198,000.00;

f. Physical impairment in the future: $657,000.00;

g. Medical expenses in the past: $509,534.95;

h. Medical expenses in the future: $163,866.24; and

i. Pre-judgment interest on the recovery of damages sustained in the past, at the rate of 7.75%, in the amount of $182,644.06.

The Court finds that the judgment for Shirley Sommer has been partially satisfied in the amount of **$269,545.27**.

Therefore, the Court ORDERS that Shirley Sommer have and recover **$1,889,019.98** from Defendants, jointly and severally, and post-judgment interest on the sum of **$1,889,019.98** at the rate of 7.75% per annum, compounded annually, from the date of this Judgment until paid.

**19. Judgment for Peggy Armstrong:**

a. Physical pain and mental anguish in the past: $99,000.00;

b. Physical pain and mental anguish in the future: $250,00.00 [sic];

c. Loss of earning capacity in the past: $3,116.00;

d. Loss of earning capacity in the future: $3,000.00;

e. Disfigurement in the past $10,000.00;

f. Disfigurement in the future: $10,000.00;

g. Physical impairment in the past: $198,000.00;

h. Physical impairment in the future: $250,000.00;

i. Medical expenses in the past: $59,500.00

j. Medical expenses in the future: $50,000.00; and

k. Pre-judgment interest on the recovery of damages sustained in the past, at the rate of 7.75%, in the amount of $83,185.78.

The Court finds that the judgment for Peggy Armstrong has been partially satisfied in the amount of **$121,147.32**.

Therefore, the Court ORDERS that Peggy Armstrong have and recover **$894,654.46** from Defendants, jointly and severally, and post-judgment interest on the sum of **$894,654.46** at the rate of 7.75% per annum, compounded annually, from the date of this Judgment until paid.

**20. Court Costs and Execution**

All costs of court expended or incurred in this cause are taxed against Defendants.

All writs and processes for the enforcement and collection of this Judgment and the costs of court may issue as necessary.

All other relief not expressly granted in this Judgment is denied. This Judgment finally disposes of all claims and all parties and is appealable.

SIGNED ON May 24, 2006.

/s/ Jim Meyer
JIM MEYER, JUDGE
170th Judicial District Court
McLennan County, Texas

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**CAUSE NO. 2003-2308-4**

| | | |
|---|---|---|
| **JAMES HINTON, et al.** | § | **IN THE DISTRICT** |
| | § | **COURT OF** |
| **VS.** | § | **McLENNAN COUNTY,** |
| | § | **TEXAS** |
| **MOTOR COACH INDUSTRIES INTERNATIONAL, INC., et al.** | § | **170TH JUDICIAL** |
| | § | **DISTRICT** |
| | § | |

**CHARGE OF THE COURT**

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the

evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately

warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case. Whenever a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence.

"Circumstantial Evidence": A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

**QUESTION 1A:**

Was there a design defect in the motorcoach in question at the time it left the possession of MCI because it did not have passenger safety belts?

A "design defect" is a condition of the product that renders it unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use. For a design defect to exist there must have been a safer alternative design.

"Safer alternative design" means a product design other than the one actually used that in reasonable probability—

(1) would have prevented or significantly reduced the risk of the injury in question without substantially impairing the product's utility; and

(2) was economically and technologically feasible at the time the product left the control of MCI by the application of existing or reasonably achievable scientific knowledge.

Answer "Yes" or "No."

Answer: yes

**QUESTION 1B:**

Answer Question 1B if you answered "Yes" to Question 1A. Otherwise, do not answer Question 1B.

Was the design defect you have found in answer to Question 1A a producing cause of the injuries to the following persons?

"Producing cause" means an efficient, exciting, or contributing cause that, in a natural sequence,

produces the injury. There may be more than one producing cause of an injury. But if an act or omission of anyone who is not a party to the suit was the "sole cause" of the injury, then the act, omission, or product of any party could not have been a cause of the injury.

Answer "Yes" or "No" for each of the following:

| | | |
|---|---|---|
| (1) | Dolores Hinton, deceased | Yes |
| (2) | James Hinton | Yes |
| (3) | Robert Kuryla | Yes |
| (4) | Karen Kuryla | Yes |
| (5) | Hattie Binns | Yes |
| (6) | Reta Haynes | Yes |
| (7) | Melinda Greger | Yes |
| (8) | Alan Horton | Yes |
| (9) | Elaine Horton | Yes |
| (10) | Ruth Powell | Yes |
| (11) | Judy Benson | Yes |
| (12) | Jo Catherine Freeman, deceased | Yes |
| (13) | James L. Freeman | Yes |
| (14) | Robert Melvin Akers, Sr., deceased | Yes |
| (15) | Mildred Delois Akers, deceased | Yes |
| (16) | Wayne Beasley, deceased | Yes |
| (17) | Patsy Beasley | Yes |
| (18) | Shirley Sommer | Yes |
| (19) | Peggy Armstrong | Yes |

**QUESTION 2A:**

Was there a design defect in the motorcoach in question at the time it left the possession of MCI because laminated glass was not used in the side passenger windows?

A "design defect" is a condition of the product that renders it unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use. For a design defect to exist there must have been a safer alternative design.

"Safer alternative design" means a product design other than the one actually used that in reasonable probability:

(1) would have prevented or significantly reduced the risk of the injury in question without substantially impairing the product's utility; and

(2) was economically and technologically feasible at the time the product left the control of MCI by the application of existing or reasonably achievable scientific knowledge.

Answer "Yes" or "No."

Answer: yes

**QUESTION 2B:**

Answer Question 2B if you answered "Yes" to Question 2A. Otherwise, do not answer Question 2B.

Was the design defect you have found in answer to Question 2A a producing cause of the injuries to the following persons?

"Producing cause" means an efficient, exciting, or contributing cause that, in a natural sequence,

produces the injury. There may be more than one producing cause of an injury. But if an act or omission of anyone who is not a party to the suit was the "sole cause" of the injury, then the act, omission, or product of any party could not have been a cause of the injury.

Answer "Yes" or "No" for each of the following:

| | | |
|---|---|---|
| (1) | Dolores Hinton, deceased | Yes |
| (2) | James Hinton | No |
| (3) | Robert Kuryla | No |
| (4) | Karen Kuryla | No |
| (5) | Hattie Binns | Yes |
| (6) | Reta Haynes | Yes |
| (7) | Melinda Greger | Yes |
| (8) | Alan Horton | No |
| (9) | Elaine Horton | Yes |
| (10) | Ruth Powell | Yes |
| (11) | Judy Benson | No |
| (12) | Jo Catherine Freeman, deceased | Yes |
| (13) | James L. Freeman | No |
| (14) | Robert Melvin Akers, Sr., deceased | Yes |
| (15) | Mildred Delois Akers, deceased | Yes |
| (16) | Wayne Beasley, deceased | Yes |
| (17) | Patsy Beasley | No |
| (18) | Shirley Sommer | Yes |
| (19) | Peggy Armstrong | Yes |

**QUESTION 3:**

If you answered "Yes" to subpart "(1) Dolores Hinton, deceased" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money would have fairly and reasonably compensated **Dolores Hinton** for:

a. Funeral and burial expenses.

"Funeral and burial expenses" means the reasonable amount of expenses for funeral and burial for Dolores Hinton reasonably suitable to her station in life.

Answer in dollars and cents for damages, if any.

Answer: 9,161.37

**QUESTION 4A:**

If you answered "Yes" to subpart "(1) Dolores Hinton, deceased" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **James Hinton** for his damages, if any, resulting from the death of Dolores Hinton?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

In determining damages for elements c, d, e, and f, you may consider the relationship between

James Hinton and Dolores Hinton, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

Answer separately, in dollars and cents, for damages, if any.

a. Pecuniary loss sustained in the past.

"Pecuniary loss" means the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value, excluding loss of inheritance, that James Hinton, in reasonable probability, would have received from Dolores Hinton had she lived.

Answer: 35,000.00

b. Pecuniary loss that, in reasonable probability, will be sustained in the future.

Answer: 200,000.00

c. Loss of companionship and society sustained in the past.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that James Hinton, in reasonable probability, would have received from Dolores Hinton had she lived.

Answer: 540,000.00

d. Loss of companionship and society that, in reasonable probability, will be sustained in the future.

Answer: 540,000.00

e. Mental anguish sustained in the past.

"Mental anguish" means the emotional pain, torment, and suffering experienced by James Hinton because of the death of Dolores Hinton.

Answer: 540,000.00

f. Mental anguish that, in reasonable probability, will be sustained in the future.

Answer: 540,000.00

**QUESTION 4B:**

If you answered "Yes" to subpart "(2) James Hinton" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **James Hinton** for his injuries, if any, that resulted from any defect you have found?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do

not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any.

a. Physical pain and mental anguish sustained in the past.

Answer: 0

b. Physical pain and mental anguish that, in reasonable probability, James Hinton will sustain in the future.

Answer: 0

c. Physical impairment sustained in the past.

Answer: 0

**QUESTION 5:**

If you answered "Yes" to subpart "(1) Dolores Hinton, deceased" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **David Hinton** for his damages, if any, resulting from the death of Dolores Hinton?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a

sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

In determining damages for elements a, b, c, and d, you may consider the relationship between David Hinton and Dolores Hinton, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

Answer separately, in dollars and cents, for damages, if any.

a. Loss of companionship and society sustained in the past.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that David Hinton, in reasonable probability, would have received from Dolores Hinton had she lived.

Answer: 75,000.00

b. Loss of companionship and society that, in reasonable probability, David Hinton will sustain in the future.

Answer: 75,000.00

c. Mental anguish sustained in the past.

"Mental anguish" means the emotional pain, torment, and suffering experienced by David

Hinton because of the death of Dolores Hinton.

Answer: 75,000.00

d. Mental anguish that, in reasonable probability, David Hinton will sustain in the future.

Answer: 75,000.00

**QUESTION 6:**

If you answered "Yes" to subpart "(3) Robert Kuryla" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **Robert Kuryla** for his injuries, if any, that resulted from any defect you have found?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any.

a. Physical pain and mental anguish sustained in the past.

Answer: 0

b. Physical pain and mental anguish that, in reasonable probability, Robert Kuryla will sustain in the future.

Answer: 0

c. Loss of earning capacity sustained in the past.

Answer: 1,800.00

d. Physical impairment sustained in the past.

Answer: 0

e. Medical care expenses incurred in the past.

Answer: 5,166.57

**QUESTION 7:**

If you answered "Yes" to subpart "(4) Karen Kuryla" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **Karen Kuryla** for her injuries, if any, that resulted from any defect you have found?

Consider the elements of damages listed below and none other. Consider each element separately. Do

not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any.

a. Physical pain and mental anguish sustained in the past.

Answer: 50,000.00

b. Physical pain and mental anguish that, in reasonable probability, Karen Kuryla will sustain in the future.

Answer: 75,000.00

c. Loss of earning capacity sustained in the past.

Answer: 2,560.00

d. Physical impairment sustained in the past.

Answer: 50,000

e. Medical care expenses incurred in the past.

Answer: 26,869.32

**QUESTION 8:**

If you answered "Yes" to subpart "(5) Hattie Binns" in Question 1B or Question 2B, then answer the

following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **Hattie Binns** for her injuries, if any, that resulted from any defect you have found?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any.

a. Physical pain and mental anguish sustained in the past.

Answer: 25,000.00

b. Physical pain and mental anguish that, in reasonable probability, Hattie Binns will sustain in the future.

Answer: 0

c. Loss of earning capacity sustained in the past.

Answer: 315.00

d. Disfigurement sustained in the past.

Answer: 1,000.00

e. Disfigurement that, in reasonable probability, Hattie Binns will sustain in the future.

Answer: 5,000.00

f. Physical impairment sustained in the past.

Answer: 5,000.00

g. Physical impairment that, in reasonable probability, Hattie Binns will sustain in the future.

Answer: 0

h. Medical care expenses incurred in the past.

Answer: 7,809.20

**QUESTION 9:**

If you answered "Yes" to subpart "(6) Reta Haynes" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **Reta Haynes** for her injuries, if any, that resulted from any defect you have found?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do

not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any.

a. Physical pain and mental anguish sustained in the past.

Answer: 99,000.00

b. Physical pain and mental anguish that, in reasonable probability, Reta Haynes will sustain in the future.

Answer: 250,000.00

c. Disfigurement sustained in the past.

Answer: 5,000.00

d. Disfigurement that, in reasonable probability, Reta Haynes will sustain in the future.

Answer: 10,000.00

e. Physical impairment sustained in the past.

Answer: 99,000.00

f. Physical impairment that, in reasonable probability, Reta Haynes will sustain in the future.

Answer: 99,000.00

g. Medical care expenses incurred in the past.

Answer: 59,986.62

**QUESTION 10:**

If you answered "Yes" to subpart "(7) Melinda Greger" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **Melinda Greger** for her injuries, if any, that resulted from any defect you have found?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any.

a. Physical pain and mental anguish sustained in the past.

Answer: 50,000.00

b. Physical pain and mental anguish that, in reasonable probability, Melinda Greger will sustain in the future.

Answer: 50,000.00

c. Loss of earning capacity sustained in the past.

Answer: 7,500.00

d. Physical impairment sustained in the past.

Answer: 25,000.00

e. Medical care expenses incurred in the past.

Answer: 10,860.87

**QUESTION 11:**

If you answered "Yes" to subpart "(8) Alan Horton" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **Alan Horton** for his injuries, if any, that resulted from any defect you have found?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any.

a. Physical pain and mental anguish sustained in the past.

Answer: 5,000.00

b. Physical pain and mental anguish that, in reasonable probability, Alan Horton will sustain in the future.

Answer: 0

c. Loss of earning capacity sustained in the past.

Answer: 385.00

d. Physical impairment sustained in the past.

Answer: 0

e. Medical care expenses incurred in the past.

Answer: 122.00

**QUESTION 12:**

If you answered "Yes" to subpart "(9) Elaine Horton" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **Elaine Horton** for her injuries, if any, that resulted from any defect you have found?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you

have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any.

a. Physical pain and mental anguish sustained in the past.

Answer: 5,000.00

b. Physical pain and mental anguish that, in reasonable probability, Elaine Horton will sustain in the future.

Answer: 5,000.00

c. Loss of earning capacity sustained in the past.

Answer: 415.68

d. Physical impairment sustained in the past.

Answer: 5,000.00

e. Medical care expenses incurred in the past.

Answer: 4,699.86

**QUESTION 13:**

If you answered "Yes" to subpart "(10) Ruth Powell" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **Ruth Powell** for her injuries, if any, that resulted from any defect you have found?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any.

a. Physical pain and mental anguish sustained in the past.

Answer: 250,000.00

b. Physical pain and mental anguish that, in reasonable probability, Ruth Powell will sustain in the future.

Answer: 688,000.00

c. Physical impairment sustained in the past.

Answer: 125,000.00

d. Physical impairment that, in reasonable probability, Ruth Powell will sustain in the future.

Answer: 688,000.00

e. Medical care expenses incurred in the past.

Answer: 54,806.55

f. Medical care expenses that, in reasonable probability, Ruth Powell will sustain in the future.

Answer: 22,000.00

**QUESTION 14:**

If you answered "Yes" to subpart "(11) Judy Benson" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **Judy Benson** for her injuries, if any, that resulted from any defect you have found?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any.

a. Physical pain and mental anguish sustained in the past.

Answer: 5,000.00

b. Physical pain and mental anguish that, in reasonable probability, Judy Benson will sustain in the future.

Answer: 0

c. Loss of earning capacity sustained in the past.

Answer: 146.00

d. Physical impairment sustained in the past.

Answer: 0

e. Medical care expenses incurred in the past.

Answer: 826.00

**QUESTION 15:**

If you answered "Yes" to subpart "(12) Jo Catherine Freeman, deceased" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money would have fairly and reasonably compensated **Jo Catherine Freeman** for:

a. Funeral and burial expenses.

"Funeral and burial expenses" means the reasonable amount of expenses for funeral

and burial for Jo Catherine Freeman reasonably suitable to her station in life.

Answer in dollars and cents for damages, if any.

Answer: 10,641.00

**QUESTION 16A:**

If you answered "Yes" to subpart "(12) Jo Catherine Freeman, deceased" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **James L. Freeman** for his damages, if any, resulting from the death of Jo Catherine Freeman?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

In determining damages for elements a, b, c, and d, you may consider the relationship between James L. Freeman and Jo Catherine Freeman, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

Answer separately, in dollars and cents, for damages, if any.

a. Loss of companionship and society sustained in the past.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that James L. Freeman, in reasonable probability, would have received from Jo Catherine Freeman had she lived.

Answer: 875,000.00

b. Loss of companionship and society that, in reasonable probability, will be sustained in the future.

Answer: 875,000.00

c. Mental anguish sustained in the past.

"Mental anguish" means the emotional pain, torment, and suffering experienced by James L. Freeman because of the death of Jo Catherine Freeman.

Answer: 875,000.00

d. Mental anguish that, in reasonable probability, will be sustained in the future.

Answer: 875,000.00

**QUESTION 16B:**

If you answered "Yes" to subpart "(13) James L. Freeman" in Question 1B or Question 2B, then answer the

following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **James L. Freeman** for his injuries, if any, that resulted any [sic] defect you have found?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any.

a. Medical care expenses incurred in the past.

Answer: 1,975.50

**QUESTION 17:**

If you answered "Yes" to subpart "(12) Jo Catherine Freeman, deceased" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **James F. Freeman** for his damages, if any, resulting from the death of Jo Catherine Freeman?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

In determining damages for elements a, b, c, and d, you may consider the relationship between James F. Freeman and Jo Catherine Freeman, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

Answer separately, in dollars and cents, for damages, if any.

a. Loss of companionship and society sustained in the past.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that James F. Freeman, in reasonable probability, would have received from Jo Catherine Freeman had she lived.

Answer: 86,000.00

b. Loss of companionship and society that, in reasonable probability, James F. Freeman will sustain in the future.

Answer: 86,000.00

c. Mental anguish sustained in the past.

"Mental anguish" means the emotional pain, torment, and suffering experienced by James F. Freeman because of the death of Jo Catherine Freeman.

Answer: 86,000.00

d. Mental anguish that, in reasonable probability, James F. Freeman will sustain in the future.

Answer: 86,000.00

**QUESTION 18:**

If you answered "Yes" to subpart "(12) Jo Catherine Freeman, deceased" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **Melanie Jo Brooks** for her damages, if any, resulting from the death of Jo Catherine Freeman?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

In determining damages for elements a, b, c, and d, you may consider the relationship between Melanie

Jo Brooks and Jo Catherine Freeman, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

Answer separately, in dollars and cents, for damages, if any.

a. Loss of companionship and society sustained in the past.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that Melanie Jo Brooks, in reasonable probability, would have received from Jo Catherine Freeman had she lived.

Answer: 86,000.00

b. Loss of companionship and society that, in reasonable probability, Melanie Jo Brooks will sustain in the future.

Answer: 86,000.00

c. Mental anguish sustained in the past.

"Mental anguish" means the emotional pain, torment, and suffering experienced by Melanie Jo Brooks because of the death of Jo Catherine Freeman.

Answer: 86,000.00

d. Mental anguish that, in reasonable probability, Melanie Jo Brooks will sustain in the future.

Answer: 86,000.00

**QUESTION 19:**

If you answered "Yes" to subpart "(14) Robert Melvin Akers, Sr., deceased" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money would have fairly and reasonably compensated **Robert Melvin Akers, Sr.** for:

a. Funeral and burial expenses.

"Funeral and burial expenses" means the reasonable amount of expenses for funeral and burial for Robert Melvin Akers, Sr. reasonably suitable to his station in life.

Answer in dollars and cents for damages, if any.

Answer: 4,263.00

**QUESTION 20:**

If you answered "Yes" to subpart "(15) Mildred Delois Akers, deceased" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money would have fairly and reasonably compensated **Mildred Delois Akers** for:

a. Funeral and burial expenses.

"Funeral and burial expenses" means the reasonable amount of expenses for funeral

and burial for Mildred Delois Akers reasonably suitable to her station in life.

Answer in dollars and cents for damages, if any.

Answer: 7,653.50

**QUESTION 21A:**

If you answered "Yes" to subpart "(14) Robert Melvin Akers, Sr., deceased" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **Susan Akers Bills** for her damages, if any, resulting from the death of Robert Melvin Akers, Sr.?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any.

In determining damages for elements a, b, c, and d, you may consider the relationship between Susan Akers Bills and Robert Melvin Akers, Sr., their living arrangements, any extended absences from one

another, the harmony of their family relations, and their common interests and activities.

a. Loss of companionship and society sustained in the past.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that Susan Akers Bills, in reasonable probability, would have received from Robert Melvin Akers, Sr. had he lived.

Answer: 125,000.00

b. Loss of companionship and society that, in reasonable probability, Susan Akers Bills will sustain in the future.

Answer: 125,000.00

c. Mental anguish sustained in the past.

"Mental anguish" means the emotional pain, torment, and suffering experienced by Susan Akers Bills because of the death of Robert Melvin Akers, Sr.

Answer: 125,000.00

d. Mental anguish that, in reasonable probability, Susan Akers Bills will sustain in the future.

Answer: 125,000.00

**QUESTION 21B:**

If you answered "Yes" to subpart "(15) Mildred Delois Akers, deceased" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **Susan Akers Bills** for her damages, if any, resulting from the death of Mildred Delois Akers?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

In determining damages for elements a, b, c, and d, you may consider the relationship between Susan Akers Bills and Mildred Delois Akers, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

Answer separately, in dollars and cents, for damages, if any.

a. Loss of companionship and society sustained in the past.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society

that Susan Akers Bills, in reasonable probability, would have received from Mildred Delois Akers had she lived.

Answer: 125,000.00

b. Loss of companionship and society that, in reasonable probability, Susan Akers Bills will sustain in the future.

Answer: 125,000.00

c. Mental anguish sustained in the past.

"Mental anguish" means the emotional pain, torment, and suffering experienced by Susan Akers Bills because of the death of Mildred Delois Akers.

Answer: 125,000.00

d. Mental anguish that, in reasonable probability, Susan Akers Bills will sustain in the future.

Answer: 125,000.00

**QUESTION 22A:**

If you answered "Yes" to subpart "(14) Robert Melvin Akers, Sr., deceased" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **Robert Melvin Akers, Jr.** for his damages, if any, resulting from the death of Robert Melvin Akers, Sr.?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

In determining damages for elements a, b, c, and d, you may consider the relationship between Robert Melvin Akers, Jr. and Robert Melvin Akers, Sr., their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

Answer separately, in dollars and cents, for damages, if any.

a. Loss of companionship and society sustained in the past.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that Robert Melvin Akers, Jr., in reasonable probability, would have received from Robert Melvin Akers, Sr. had he lived.

Answer: 125,000.00

b. Loss of companionship and society that, in reasonable probability, Robert Melvin Akers, Jr. will sustain in the future.

Answer: 125,000.00

c. Mental anguish sustained in the past.

"Mental anguish" means the emotional pain, torment, and suffering experienced by Robert Melvin Akers, Jr. because of the death of Robert Melvin Akers, Sr.

Answer: 125,000.00

d. Mental anguish that, in reasonable probability, Robert Melvin Akers, Jr. will sustain in the future.

Answer: 125,000.00

**QUESTION 22B:**

If you answered "Yes" to subpart "(15) Mildred Delois Akers, deceased" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **Robert Melvin Akers, Jr.** for his damages, if any, resulting from the death of Mildred Delois Akers?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

In determining damages for elements a, b, c, and d, you may consider the relationship between Robert Melvin Akers, Jr. and Mildred Delois Akers, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

Answer separately, in dollars and cents, for damages, if any.

a. Loss of companionship and society sustained in the past.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that Robert Melvin Akers, Jr., in reasonable probability, would have received from Mildred Delois Akers had she lived.

Answer: 125,000.00

b. Loss of companionship and society that, in reasonable probability, Robert Melvin Akers, Jr. will sustain in the future.

Answer: 125,000.00

c. Mental anguish sustained in the past.

"Mental anguish" means the emotional pain, torment, and suffering experienced by Robert Melvin Akers, Jr. because of the death of Mildred Delois Akers.

Answer: 125,000.00

d. Mental anguish that, in reasonable probability, Robert Melvin Akers, Jr. will sustain in the future.

Answer: 125,000.00

**QUESTION 23:**

If you answered "Yes" to subpart "(16) Wayne Beasley, deceased" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money would have fairly and reasonably compensated **Wayne Beasley** for his injuries, if any, resulting from any defect you have found?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Do not include any amount for any condition existing before the occurrence in question, except to the extent, if any, that such other condition was aggravated by any defect you have found.

a. Pain and mental anguish.

"Pain and mental anguish" means the conscious physical pain and emotional pain, torment, and suffering experienced by Wayne

Beasley before his death as a result of the occurrence in question.

Answer in dollars and cents for damages, if any.

Answer: 0

b. Medical expenses.

"Medical expenses" means the reasonable expense of the necessary medical and hospital care received by Wayne Beasley for treatment of injuries sustained by him as a result of the occurrence in question.

Answer in dollars and cents for damages, if any.

Answer: 311,697.74

c. Funeral and burial expenses.

"Funeral and burial expenses" means the reasonable amount of expenses for funeral and burial for Wayne Beasley reasonably suitable to his station in life.

Answer in dollars and cents for damages, if any.

Answer: 13,367.75

**QUESTION 24A:**

If you answered "Yes" to subpart "(16) Wayne Beasley, deceased" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **Patsy Beasley** for

her damages, if any, resulting from the death of Wayne Beasley?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

In determining damages for elements a, b, c, and d, you may consider the relationship between Patsy Beasley and Wayne Beasley, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

Answer separately, in dollars and cents, for damages, if any.

a. Loss of companionship and society sustained in the past.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that Patsy Beasley, in reasonable probability, would have received from Wayne Beasley had he lived.

Answer: 625,000.00

b. Loss of companionship and society that, in reasonable probability, will be sustained in the future.

Answer: 625,000.00

c. Mental anguish sustained in the past.

"Mental anguish" means the emotional pain, torment, and suffering experienced by Patsy Beasley because of the death of Wayne Beasley.

Answer: 625,000.00

d. Mental anguish that, in reasonable probability, will be sustained in the future.

Answer: 625,000.00

**QUESTION 24B:**

If you answered "Yes" to subpart "(17) Patsy Beasley" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **Patsy Beasley** for her injuries, if any, that resulted from any defect you have found?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Do not include any amount for any condition existing before the occurrence in question, except to

the extent, if any, that such other condition was aggravated by any defect you have found.

Answer separately, in dollars and cents, for damages, if any.

a. Physical pain and mental anguish sustained in the past.

Answer: 10,000.00

b. Physical pain and mental anguish that, in reasonable probability, Patsy Beasley will sustain in the future.

Answer: 0

c. Physical impairment sustained in the past.

Answer: 0

d. Physical impairment that, in reasonable probability, Patsy Beasley will sustain in the future.

Answer: 0

e. Medical care expenses incurred in the past.

Answer: 42,701.62

**QUESTION 25:**

If you answered "Yes" to subpart "(18) Shirley Sommer" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **Shirley Sommer** for her injuries, if any, that resulted from any defect you have found?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Do not include any amount for any condition existing before the occurrence in question, except to the extent, if any, that such other condition was aggravated by any defect you have found.

Answer separately, in dollars and cents, for damages, if any.

a. Physical pain and mental anguish sustained in the past.

Answer: 99,000.00

b. Physical pain and mental anguish that, in reasonable probability, Shirley Sommer will sustain in the future.

Answer: 328,500.00

c. Disfigurement sustained in the past.

Answer: 5,000.00

d. Disfigurement that, in reasonable probability, Shirley Sommer will sustain in the future.

Answer: 15,000.00

e. Physical impairment sustained in the past.

Answer: 198,000.00

f. Physical impairment that, in reasonable probability, Shirley Sommer will sustain in the future.

Answer: 657,000.00

g. Medical care expenses incurred in the past.

Answer: 509,534.95

h. Medical care expenses that, in reasonable probability, Shirley Sommer will sustain in the future.

Answer: 163,866.24

**QUESTION 26:**

If you answered "Yes" to subpart "(19) Peggy Armstrong" in Question 1B or Question 2B, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate **Peggy Armstrong** for her injuries, if any, that resulted from any defect you have found?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any.

a. Physical pain and mental anguish sustained in the past.

Answer: 99,000.00

b. Physical pain and mental anguish that, in reasonable probability, Peggy Armstrong will sustain in the future.

Answer: 250,000.00

c. Loss of earning capacity sustained in the past.

Answer: 3,116.00

d. Loss of earning capacity that, in reasonable probability, Peggy Armstrong will sustain in the future.

Answer: 3,000.00

e. Disfigurement sustained in the past.

Answer: 10,000.00

f. Disfigurement that, in reasonable probability, Peggy Armstrong will sustain in the future.

Answer: 10,000.00

g. Physical impairment sustained in the past.

Answer: 198,000.00

h. Physical impairment that, in reasonable probability, Peggy Armstrong will sustain in the future.

Answer: 250,000.00

i. Medical care expenses incurred in the past.

Answer: 59,500.00

j. Medical care expenses that in reasonable probability, Peggy Armstrong will sustain in the future.

Answer: 50,000.00

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror –

1. to preside during your deliberations,

2. to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge,

3. to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge,

4. to vote on the questions,

5. to write your answers to the questions in the spaces provided, and

6. to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all the questions you are required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

/s/ Jim Meyer
JUDGE PRESIDING
[Nov. 1, 2005
9:00 am]

Certificate

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

(To be signed by the presiding juror if unanimous.)

_____
PRESIDING JUROR

(To be signed by those rendering the verdict if not unanimous.)

| | |
|---|---|
| /s/ Gary D. Paris | /s/ Misty Mason |
| /s/ Yerisa A. Collins | /s/ Willie Guinn |
| /s/ Katherine E. Nabor | /s/ Landon Painter |
| /s/ Sandra Corbett | /s/ Glenn A. Parmalee |
| /s/ Annette Montgomery | /s/ _____ |
| /s/ Carly Webb | /s/ _____ |

## 49 CFR 571.205

§ 571.205 Standard No. 205, Glazing materials.

S1. Scope. This standard specifies requirements for glazing materials for use in motor vehicles and motor vehicle equipment.

S2. Purpose. The purpose of this standard is to reduce injuries resulting from impact to glazing surfaces, to ensure a necessary degree of transparency in motor vehicle windows for driver visibility, and to minimize the possibility of occupants being thrown through the vehicle windows in collisions.

S3. Application and Incorporation by Reference.

S3.1 Application.

(a) This standard applies to passenger cars, multipurpose passenger vehicles, trucks, buses, motorcycles, slide-in campers, pickup covers designed to carry persons while in motion and low speed vehicles, and to glazing materials for use in those vehicles.

* * *

S3.2 Incorporation by Reference.

(a) "American National Standard for Safety Glazing Materials for Glazing Motor Vehicles and Motor Vehicle Equipment Operating on Land Highways-Safety Standard" ANSI/SAE Z26.1-1996, Approved by American National Standards Institute August 11, 1997 (ANSI/SAE Z26.1-1996) is incorporated by reference in Section 5.1 and is hereby made

part of this Standard. The Director of the Federal Register approved the material incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51 (see § 571.5 of this part). A copy of ANSI/SAE Z26.1-1996 may be obtained from the Society of Automotive Engineers, Inc., 400 Commonwealth Drive, Warrendale, PA 15096-0007. A copy of ANSI/SAE Z26.1-1996 may be inspected at NHTSA's technical reference library, 400 Seventh Street, SW., Room 5109, Washington, DC or at the Office of the Federal Register, 900 North Capitol Street, NW., Suite 700, Washington, DC.

* * *

S5. Requirements.

S5.1 Glazing materials for use in motor vehicles must conform to ANSI/SAE Z26.1-1996 unless this standard provides otherwise.

* * *

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## 49 CFR 571.208

§ 571.208 Standard No. 208; Occupant crash protection. [Effective until Jan. 12, 2009.]

S1. Scope. This standard specifies performance requirements for the protection of vehicle occupants in crashes.

S2. Purpose. The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.

S3. Application. (a) This standard applies to passenger cars, multipurpose passenger vehicles, trucks, and buses. . . .

* * *

S4.4 Buses.

* * *

S4.4.2 Buses manufactured on or after September 1, 1990. Each bus manufactured on or after September 1, 1990, shall meet the requirements of S4.4.2.1 or S4.4.2.2.

S4.4.2.1 First option—complete passenger protection system—driver only. T1The [sic] vehicle shall meet the crash protection requirements of S5, with respect to an anthropomorphic test dummy in the

driver's designated seating position, by means that require no action by vehicle occupants.

S4.4.2.2 Second option—belt system—driver only. The vehicle shall, at the driver's designated seating position, have either a Type 1 or a Type 2 seat belt assembly that conforms to § 571.209 of this part and S7.2 of this Standard. . . .

* * *

S4.4.3 Buses manufactured on or after September 1, 1991.

S4.4.3.1 Each bus with a gross vehicle weight rating of more than 10,000 pounds shall comply with the requirements S4.4.2.1 or S4.4.2.2.

* * *

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1840 (2)

No. 10-1148

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

# In The
# Supreme Court of the United States

MCI SALES AND SERVICE, INC., *et al.*,

*Petitioners,*

v.

JAMES HINTON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DOLORES HINTON, DECEASED, *et al.*,

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Texas**

## BRIEF IN OPPOSITION

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. The Texas Supreme Court properly applied the Court's decision in *Geier v. American Honda Motor Co.* and the Fifth Circuit's decision in *O'Hara v. General Motors Corp.*, and correctly held that the Respondents' glass claims do not conflict with or present an obstacle to any significant federal regulatory objective expressed in Federal Motor Vehicle Safety Standard ("FMVSS") 205. Since the Texas Supreme Court's decision is consistent with *Geier* and *Williamson v. Mazda Motor of America, Inc.*, decided shortly after this case, have the Petitioners presented compelling reasons to grant the Petition?

2. The Texas Supreme Court properly applied the Court's decisions in *Geier v. American Honda Motor Co.*, *Freightliner Corp. v. Myrick*, and *Sprietsma v. Mercury Marine*, and correctly held that the Respondents' claims do not conflict with or present an obstacle to any significant federal regulatory objective expressed in FMVSS 208. FMVSS 208 does not address occupant protection of any kind for passengers in large motorcoaches – it is completely silent. As the Court noted in *Sprietsma* and *Myrick*, the absence of regulation ordinarily is not preemptive. Have the Petitioners presented compelling reasons to grant the Petition when the Texas Supreme Court's decision followed and is consistent with the relevant decisions of this Court?

## COUNTERSTATEMENT OF QUESTIONS PRESENTED – Continued

3. The Texas Supreme Court applied the implied preemption framework described by the Court in *Geier*, *Sprietsma*, and *Myrick*, and followed by the Fifth Circuit in *O'Hara*, in deciding that neither FMVSS 205 nor FMVSS 208 preempt the Respondents' claims. The Texas Supreme Court's decision and the Fifth Circuit's decision in *O'Hara* are also consistent with *Williamson*. Since the Texas Supreme Court properly applied the relevant prior decisions of this Court, and its decision is also consistent with *Williamson*, have the Petitioners presented compelling reasons to grant the Petition?

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49 C.F.R. § 571.222 ..... 13

38 Fed. Reg. 4776 (Feb. 22, 1973) ..... 12

39 Fed. Reg. 27585 (July 30, 1974) ..... 12, 13

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OTHER

STANSIFER, ET AL., INSTITUTE FOR RESEARCH IN PUBLIC SAFETY, ANALYSIS FOR NEED FOR PASSENGER SAFETY BELT REQUIREMENTS IN INTERCITY BUSES (Sept. 30, 1977) ..... 14

## REASONS FOR DENYING THE PETITION

In *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), the Court considered the preemptive effect of a regulation addressing the use of passive restraints in passenger vehicles. The regulation had a complex history and reflected a policy decision by the National Highway Traffic Safety Administration (NHTSA) to deliberately encourage a variety of passive restraint devices, including air bags. Because of this regulatory history and NHTSA's deliberate decision to promote a mix of different passive restraint options in motor vehicles, the Court held that a common law claim predicated on the failure of a manufacturer to pick a specific type of passive restraint – an air bag – was preempted.

Since *Geier*, numerous federal and state courts have considered the extent to which the Motor Vehicle Safety Act ("Safety Act" or "MVSA") preempts common law claims against vehicle manufacturers. In *Williamson v. Mazda Motor of America, Inc.*, 562 U.S. ___ (2011), the Court clarified that *Geier* does not mandate preemption any time a manufacturer is deprived of a choice. Instead, in order to have preemptive effect, the *choice itself* must be a significant regulatory objective.

There are two federal regulations at issue in this case: FMVSS 205 regulates the glazing materials (or glass) that may be used in motor vehicles, and FMVSS 208 governs occupant protection in motor vehicles. FMVSS 205 permits manufacturers to use

either tempered glass or laminated glass in the side windows of vehicles, including large motorcoaches.[1] FMVSS 208 does not mandate any form of occupant protection for passengers in large motorcoaches; it only requires a seat belt for the driver's seating position.[2]

Petitioners MCI Sales and Service, Inc. and Motor Coach Industries Mexico, S.A. de C.V. (collectively, "MCI") contend that the Respondents' (collectively, "Hinton")[3] common law product liability claims are preempted by these regulations. The Texas Supreme Court held that neither FMVSS 205 nor 208 preempt Hinton's claims. FMVSS 205 does not preempt Hinton's glass claim because the regulation merely recognizes that manufacturers must decide which option – tempered or laminated glass – is best suited for their vehicle. As in *Williamson*, that choice

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[1] "Large motorcoach" as used by Respondents means a bus that weighs greater than 10,000 pounds, since that is how FMVSS 208 is structured in terms of the motorcoach regulations. It is undisputed that the motorcoach at issue here weighed greater than 10,000 pounds.

[2] *See* 49 C.F.R. § 571.208 S4.4.3.1, which references S4.4.2.1, S4.4.2.2 for large buses (relevant excerpt included at MCI's App. 213). All of the FMVSS standards are codified at 49 C.F.R. § 571.xxx, where "xxx" represents the particular standard number. For example, FMVSS 205 is codified at 49 C.F.R. § 571.205.

[3] For ease of reference, the Respondents will collectively be referred to as "Hinton." Although there are several Respondents, the singular tense will be used unless the context requires otherwise.

does not involve a significant federal objective, so a common law claim predicated on the manufacturer's failure to use the safer glass is not preempted. FMVSS 208 does not preempt Hinton's seatbelt claim because the regulation is silent with regard to occupant protection for passengers, consistent with the Court's decisions in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) and *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002).

## I. The Texas Supreme Court properly analyzed whether the glass claim is preempted by FMVSS 205 and correctly concluded it is not.

Hinton contended and the jury found that MCI's bus was defective because it should have been equipped with laminated glass in the side passenger windows, as MCI has done with most of its other buses for more than 35 years. MCI asserts Hinton's laminated glass claim is preempted because it conflicts with FMVSS 205. FMVSS 205 undoubtedly allows manufacturers to use either tempered glass or laminated glass in the side windows of vehicles, including motorcoaches. The question is whether the choice afforded by FMVSS 205 is a "*Geier* choice" or a "*Williamson* choice."

The Texas Supreme Court held FMVSS 205 presents manufacturers with a non-preemptive choice similar to the one this Court later analyzed in *Williamson*. The Fifth Circuit reached the same

conclusion in *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007). There is no compelling reason to grant the Petition because the Texas Supreme Court properly applied the correct rule of law and reached the correct decision.

### A. FMVSS 205 is like the regulation in *Williamson* and unlike the regulation in *Geier*. Because the "choice" provided by the regulation does not involve a significant federal objective, FMVSS 205 does not preempt Hinton's glass claim.

The Texas Supreme Court's opinion details the relevant history and objectives of FMVSS 205. App. 16-19. The standard "specifies requirements for glazing materials for use in motor vehicles." App. 16. It states three objectives – to reduce injuries resulting from impact to glazing surfaces, to ensure adequate driver visibility, and to minimize the risk of occupants from being ejected through windows in collisions. App. 16-17, citing 49 C.F.R. § 571.205 S2 (reproduced at App. 211). FMVSS 205 permits manufacturers to use either tempered glass or laminated glass (sometimes referred to as "advanced glazing" or "safety glass") in side windows, though it requires laminated glass for windshields. App. 17-18.

MCI contends the choice afforded by FMVSS 205 has preemptive force, because the choice represents a significant regulatory objective. To be sure, NHTSA has carefully considered its regulation of

side windows and the appropriate materials to be used. As the Texas Supreme Court noted, the regulatory history of FMVSS 205 reflects "NHTSA's conclusion that no one type of glazing material is superior in all situations, and it leaves to manufacturers the decision of what kind of material – so long as it is one of the required kinds – to use in a particular setting." App. 19.

But the choice afforded by FMVSS 205 is not the same sort of choice the Court analyzed in *Geier*. The Court discussed in detail the extensive regulatory history of FMVSS 208 in *Geier* and its unique and specific regulatory framework, which was specifically designed to promote a variety of passive restraint devices, as well as a timeline for phasing in the more advanced devices such as air bags. *Geier*, 529 U.S. at 875-81.

FMVSS 205 has a different regulatory history. Its history simply reflects that there are advantages and disadvantages to both types of permissible glass, so it is up to the manufacturer to decide which type is best suited for its vehicle. For example, when NHTSA was considering mandating laminated glass in side windows, it focused on the ability of laminated glass to reduce the risk of passenger ejections. App. 18. But NHTSA received comments questioning whether a mandate requiring laminated glass might increase the risk of head and neck injuries for belted occupants. *Id.* Faced with these competing engineering issues, NHTSA decided to leave the decision up to manufacturers.

By way of further explanation of the competing engineering issues, the risk of ejection in passenger cars with relatively small side windows is lower, so perhaps tempered glass would be the better choice for such a vehicle. But the side windows in sport utility vehicles are typically larger, so perhaps laminated glass is a better choice. Likewise, in motorcoaches equipped with large, panoramic side windows (and no seat belts), perhaps laminated glass is the better choice because the risk of ejection is much higher. In fact, MCI uses laminated glass in almost all of its buses, just not the one involved in this accident. App. 97-98.

NHTSA's decision was not based on an affirmative desire to have a mixture of vehicles with laminated and tempered side glass. Rather, NHTSA's decision merely reflected that there was no clearly better single option, so manufacturers were expected to use their discretion and select the material best suited for their particular vehicle.

As with the option afforded manufacturers in *Williamson* to install two-point or three-point seat belts, the choice afforded manufacturers under FMVSS 205 does not advance a significant regulatory objective. A state law claim imposing liability on a bus manufacturer for not using the safer glass alternative will not frustrate the regulatory purposes expressed by NHTSA, so FMVSS 205 does not preempt Hinton's glass claim.

### B. The Texas Supreme Court's decision and the Fifth Circuit's decision in *O'Hara v. General Motors Corp.* are consistent with *Williamson*. The West Virginia Supreme Court's decision in *Morgan v. Ford Motor Company* and the South Carolina Supreme Court's decision in *Priester v. Cromer* were incorrectly decided because they relied on an interpretation of *Geier* the Court rejected in *Williamson*.

Before *Williamson*, several courts struggled with the extent to which *Geier*'s reasoning applied to FMVSS 205. In *Morgan v. Ford Motor Co.*, 680 S.E.2d 77 (W. Va. 2009); *Priester v. Cromer*, 697 S.E.2d 567 (S.C. 2010), *vacated and remanded*, 562 U.S. ___ (2011); and *Lake v. Memphis Landsmen, L.L.C.*, No. W2009-00526-COA-R3-CV, 2010 Tenn. App. LEXIS 200 (Ten. Ct. App. Mar. 15, 2010), the courts followed a broad view of *Geier*, holding that any time a regulation affords a manufacturer a choice between options, a common law claim that forecloses one of those options is preempted. *Morgan*, 680 S.E.2d at 94-95; *Priester*, 697 S.E.2d at 571; *Lake*, 2010 Tenn. App. LEXIS 200, at *8-9. Those courts acknowledged the Fifth Circuit had held such claims were not preempted in *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007). Yet they rejected *O'Hara* and followed the broad interpretation of *Geier*.

On the other hand, the Texas Supreme Court and the Fifth Circuit followed a more narrow view of

*Geier*, holding that "mere choice" is not enough to preempt – instead, the choice itself must implicate a significant federal objective. App. 40-42; *O'Hara*, 508 F.3d at 759-761. In discussing *Geier*, the Texas Supreme Court reasoned:

> The Supreme Court in *Geier* did not condemn a common-law rule merely because it foreclosed a choice under the relevant safety standard. Rather, the Court emphasized the purpose of the choice. . . . That is, the *choice itself* furthered the overall goal of safety, allowing manufacturers to experiment with different options and to build the public's confidence in the new technologies. . . . [W]hen *Geier*'s reasoning is oversimplified to find preemption based on a choice between two safety options and then exported to other safety standards where the unique text and history of FMVSS 208's passive restraint requirements are not relevant, we must respectfully disagree.

App. 41-42 (emphasis in original).

Although *Williamson* was decided after *O'Hara* and the Texas Supreme Court's decision in this case, both of those decisions are consistent with the explanation of *Geier* articulated by the Court in *Williamson*:

> In *Geier*, then, the regulation's history, the agency's contemporaneous explanation, and its consistently held interpretive views indicated that the regulation sought to maintain manufacturer choice in order to further

> significant regulatory objectives. Here, the same considerations indicate the contrary. We consequently conclude that, even though the state tort suit may restrict the manufacturer's choice, it does not "stand as an obstacle to the accomplishment of the full purposes and objectives" of federal law. Thus, the regulation does not pre-empt this tort claim.

*Williamson*, Slip Op. at 12.

FMVSS 205 affords a choice, but the choice does not further a significant regulatory objective. Rather, FMVSS 205 puts the burden on manufacturers to decide which choice is best suited for their vehicles. A common law claim that the manufacturer made the wrong choice will not obstruct the purposes and objectives of NHTSA and is not preempted.

If courts were confused about the extent to which *Geier* mandates preemption whenever a motor vehicle safety standard affords a choice among different options, the Court answered that question in *Williamson*. Thus, there is no compelling reason to grant the Petition.

## II. The Texas Supreme Court properly analyzed the seat belt claim and correctly concluded it is not preempted by FMVSS 208.

The regulatory history of FMVSS 208 and large motorcoaches reveals that NHTSA simply has left

occupant protection for passengers in large motorcoaches unregulated since the Motor Vehicle Safety Act was adopted in 1966. In light of this history of regulatory inaction, the Texas Supreme Court correctly held Hinton's seatbelt claim is not preempted.

### A. FMVSS 208 is silent with regard to occupant protection for passengers in large motorcoaches.

The various federal motor vehicle safety standards are codified at 49 C.F.R. § 571.100 *et seq*. They regulate a wide variety of matters, including brake hoses, brake fluid, tires, driver controls, and numerous other things. A number of standards address occupant protection. FMVSS 201, for example, addresses "Occupant protection in interior impact," and imposes several interior padding requirements to minimize injury when an occupant is involved in a collision. However, it excludes buses weighing more than 4,536 kilograms, or 10,000 pounds. FMVSS 202 regulates head restraints. It also excludes large buses. FMVSS 207 regulates "Seating systems," and applies to all buses. It "establishes requirements for seats, their attachment assemblies, and their installation to minimize the possibility of their failure by forces acting on them as a result of vehicle impact." However, it specifically excludes "passenger seat[s] on a bus." FMVSS 207 S4.2. As a result, there are no requirements that govern bus passenger seat strength or whether or how those seats should even be attached to the floor of the bus.

FMVSS 208, the standard at issue in *Geier*, regulates "Occupant crash protection." It includes very detailed requirements regarding seatbelts and air bags (among other things) for all manner of vehicles. But in the section outlining requirements for buses, the requirements apply to the "driver only." Section 4.4.3 of FMVSS 208 applies to buses manufactured after September 1, 1991, which includes MCI's bus. It requires seatbelts for the passenger seats, but only for buses weighing *less* than 10,000 pounds. For large buses, like MCI's bus, the standard refers back to the requirements of sections 4.4.2.1 or 4.4.2.2, which apply only to the driver's seat. *See* App. 213-14.

FMVSS 214 regulates side impact protection, but it, too, excludes large buses. Likewise, FMVSS 216 governs roof crush resistance, but it excludes buses weighing more than 2,722 kilograms (approximately 6,000 pounds). In fact, the *only* federal motor vehicle safety standard that would apply to the seating in MCI's bus is FMVSS 302, "Flammability of interior materials."

NHTSA simply has not created any sort of regulatory framework that applies to passenger seating in large motorcoaches. Essential issues such as interior padding, head restraints and seat anchorages are not specified or even required for motorcoach passengers. There simply is no federal regulation that applies to occupant protection in large motorcoaches. In light of this absence of regulation, the Texas Supreme Court applied the rules of law expressed by this Court in

*Geier*, *Sprietsma*, and *Myrick* and correctly determined that Hinton's seat belt claim is not preempted by FMVSS 208.

### B. The history of NHTSA's consideration of passenger protection on large motorcoaches reveals nothing more than 30 years of regulatory inaction.

In 1973, NHTSA published notice of a proposed new safety standard that would require all buses to have improved passenger seats. 38 Fed. Reg. 4776 (Feb. 22, 1973). The proposed seating standard included (1) performance requirements for seat strength; (2) standardized seat heights; (3) energy absorbing head impact zones; (4) energy absorbing knee impact zones; and (5) elimination of certain types of materials and design features.

As originally proposed, the standard would apply to all types of buses: school buses, intercity motorcoaches (like MCI's bus), and transit buses (city commuter buses). The proposed standard also included an alternative approach employing seatbelts and modifying some aspects of the proposed seat design rules.

In 1974, NHTSA substituted a new proposed standard on seat design, including very specific and technical specifications for school bus passenger seating. 39 Fed. Reg. 27585 (July 30, 1974). This standard was later codified as FMVSS 222, "School bus passenger seating and crash protection," at 49

C.F.R. § 571.222. Notably, the 1974 proposed standard applied only to school buses and expressly stated it did not apply to intercity motorcoaches or transit buses. Since 1976, school bus manufacturers have been required to comply with FMVSS 222, which details specifications for a seating system known as "school bus compartmentalization." "Compartmentalization" is a passive form of passenger protection that relies on specified and engineered seating compartments to protect passengers in a crash.

Unlike school buses, however, NHTSA has left motorcoach passenger seating completely unregulated. NHTSA explained in 1974 it decided to leave motorcoach passenger seating unregulated based on cost/benefit considerations and seatbelt usage statistics available at that time:

> The NHTSA has in fact determined that seating requirements for intercity and transit buses are not justified, based on benefit/cost studies of present seating performance in these buses. Injury statistics for intercity buses indicate that seating improvement would not reduce injuries substantially. Seat belt usage surveys in intercity buses also indicate that a very low percentage of passengers would utilize seat belts if they were provided.

39 Fed. Reg. at 27585. As the Court noted in *Geier*, despite the universal belief among experts dating back to 1967 that seat belts would save lives, as late as 1984 estimates showed that only 12.5% of front

seat occupants in passenger vehicles utilized seat belts. *Geier*, 529 U.S. at 877. But since the advent of mandatory seat belt laws, the usage rates have increased dramatically. For example, according to NHTSA, usage rates in Texas exceeded 90% in 2008.[4]

Following its decision in 1974 not to regulate motorcoach occupant protection, NHTSA did not re-examine the issue until 2000. MCI asks this Court to give preemptive effect to this long history of non-action. A review of this chronology shows why MCI is incorrect.

### 1. The 1977 Indiana University Study.

MCI first discusses a study published in 1977 by Indiana University. STANSIFER, ET AL., INSTITUTE FOR RESEARCH IN PUBLIC SAFETY, ANALYSIS FOR NEED FOR PASSENGER SAFETY BELT REQUIREMENTS IN INTERCITY BUSES. (Sept. 30, 1977). This study was not commissioned by NHTSA; it was commissioned by the Federal Highway Administration – a sister agency to NHTSA. As a result, it is a stretch to say the study is a reflection of NHTSA's policies or reasoning. Moreover, NHTSA did not take any action as a result of the study. The study acknowledges that NHTSA had failed to regulate bus passenger protection despite repeated recommendations by another federal agency,

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[4] *See* "Seat Belt Use in 2008 – Use Rates in the States and Territories," available at http://www-nrd.nhtsa.dot.gov/Pubs/811106.PDF (accessed on April 14, 2011).

the National Transportation Safety Board, to install passenger seatbelts on buses. *Id.* at 2. The purpose of the study was to essentially test the cost/benefit analysis used by NHTSA in 1974. *Id.* at 1. Not surprisingly, the study found that seatbelt usage rates were too low during the study period (1972-1976) to justify mandating seatbelts. *Id.* at 3. Nevertheless, the study confirmed that "[s]afety belt restraint systems can definitely produce a positive impact on death and injuries among intercity bus occupants." *Id.* at 101.

### 2. The 1992 letter from NHTSA's general counsel to MCI does not evidence a significant regulatory objective, and may have been wrong.

MCI next discusses the 1992 "Rice letter." *See* MCI Petition at 36; 39-40. Sometime in 1992, one of MCI's affiliates wrote a letter to NHTSA inquiring about the effect of a proposed New York state statute that would require seatbelts on motorcoaches. NHTSA's counsel sent a letter responding to MCI's inquiry and stated that the Motor Vehicle Safety Act's express preemption clause would preempt the proposed legislation, and went on to further claim that NHTSA had concluded there was no safety need for seatbelts on large motorcoaches.

MCI points to the Tennessee appellate court's decision in *Lake v. Memphis Landsmen, L.L.C.*, No. W2009-00526-COA-R3-CV, 2010 Tenn. App. LEXIS

200 (Ten. Ct. App. Mar. 15, 2010), and its reliance on the Rice letter. MCI Petition at 40. But the Texas Supreme Court also discussed the Rice letter and took a more well-reasoned approach:

> We refuse to give preemptive force to this sentence for two reasons. First, there is nothing in this statement that indicates opposition to seatbelts and an affirmative desire to forbid their use. Second, to hold that NHTSA's decision not to regulate preempts state law based on a letter written eighteen years after the official decision illustrates the dangers of obstacle preemption grounded in agency musings. A letter, even by NHTSA's chief counsel, is not federal law, nor it is [sic] particularly persuasive regarding NHTSA's intent in the 1974 withdrawal. The text of the withdrawal notice is not technical or complex and speaks for itself; a later interpretation of that text is persuasive only to the extent it is correct.

App. 31 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

### 3. NHTSA has recently proposed rules requiring seatbelts in large motorcoaches.

The Texas Supreme Court's decision describes NHTSA's more recent efforts to study and adopt regulations requiring seatbelts for motorcoach passengers. App. 15-16. NHTSA announced plans to

study motorcoach passenger protection in 2000 in connection with Transport Canada, NHTSA's Canadian counterpart. App. 15. These efforts culminated in the release in 2007 and 2009 of two reports calling for rulemaking to require seatbelts for passengers in large motorcoaches, and NHTSA's issuance in 2010 of a Notice of Proposed Rulemaking that calls for three-point seatbelts for passenger seats in new motorcoaches. *Id.*; Federal Motor Vehicle Safety Standards; Motorcoach Definition; Occupant Crash Protection, 75 Fed. Reg. 50958 (Aug. 18, 2010) (to be codified at 49 C.F.R. pt. 571).

The regulatory history of FMVSS 208 shows NHTSA has left the issue of motorcoach passenger crash protection *un*regulated for more than 30 years. NHTSA has not required seatbelts or any form of compartmentalization or seat design parameters for passenger seats. NHTSA has simply left passenger protection decisions to the manufacturers' discretion. As the Court noted in *Wyeth v. Levine*, 129 S. Ct. 1187, 1203 n. 14 (2009), "[A] tort case is unlikely to obstruct the regulatory process when the record shows that the [Agency] has paid very little attention to the issues raised by the parties at trial."

### C. The Texas Supreme Court's decision is consistent with *Myrick* and *Sprietsma*, which held that the failure to regulate ordinarily is not preemptive.

The Court decided two cases addressing the question of whether an absence of regulation can

implicitly preempt common law claims such as Hinton's: *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) and *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995). In both cases, the Court held that the absence of a regulation did not preempt the common law claims.

In *Sprietsma*, the plaintiff's wife fell out of a boat and was struck by the boat's propeller and killed. The plaintiff contended the boat should have been equipped with a propeller guard. The manufacturer argued the claim was preempted because the Coast Guard had specifically considered and rejected a regulation requiring propeller guards. 537 U.S. at 61. Part of the Coast Guard's reasoning for rejecting the proposed regulation was that the guards would increase the risk of certain types of injuries. *Id.* The manufacturer argued that the Coast Guard's decision not to require propeller guards reflected a clear intent *not* to regulate, which was in conflict with the plaintiff's tort claims. The Court disagreed:

> We first consider, and reject, respondent's reliance on the Coast Guard's decision not to adopt a regulation requiring propeller guards on motorboats. It is quite wrong to view that decision as the functional equivalent of a regulation prohibiting all States . . . from adopting such a regulation. . . . The Coast Guard did not take the further step of deciding that, as a matter of policy, the States . . . should not impose some version of propeller guard regulation, and it most definitely did not reject propeller guards as

> unsafe. . . . Thus, although the Coast Guard's decision not to require propeller guards was undoubtedly intentional and carefully considered, it does not convey an "authoritative" message of federal policy against propeller guards.

537 U.S. at 61.

MCI contends *Sprietsma* is inapplicable because it involves interpretation of the Federal Boat Safety Act of 1971 (FBSA) rather than the Motor Vehicle Safety Act (MVSA). But the FBSA imposed a statutory framework that is essentially identical to the MVSA for preemption purposes. Like the MVSA, which the Court construed in *Geier*, the FBSA contains both an express preemption clause and a saving clause. *See Geier*, 529 U.S. at 867-68; *Sprietsma*, 537 U.S. at 58-59. In both cases, the Court held the express preemption clauses did not preempt common law claims, based in part on the presence of saving clauses in both statutes. In *Geier*, the Court held the regulation regarding occupant protection implicitly preempted the plaintiff's claim that the manufacturer was obligated to install an air bag. In *Sprietsma*, the Court held the decision of the Coast Guard not to mandate propeller guards did not preempt the plaintiff's claim.

MCI goes to great lengths in an attempt to convince the Court that *Sprietsma* is not applicable and the Texas Supreme Court erred in considering it. But *Sprietsma* was decided after *Geier*, was based on a statute that had a similar preemption framework

(i.e., an express preemption clause and a saving clause), and *Geier* is cited throughout the *Sprietsma* opinion. The rules of law applicable to implied conflict preemption are consistent in both decisions, and the Texas Supreme Court's decision is consistent with both *Sprietsma* and *Geier*.

Another decision of the Court is particularly instructive, though MCI does not discuss it. In *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), the Court considered the preemptive effect of a regulation under the MVSA that was silent with regard to the particular safety device at issue. The plaintiffs alleged that tractor-trailers manufactured by the defendants were defective because they lacked an antilock braking system (ABS). Like FMVSS 208 and motorcoach occupant protection, the regulation at issue in *Myrick*, FMVSS 121, did not include any requirement or prohibition regarding ABS brakes. *Id.* at 286.

The Court held "the absence of a federal standard cannot implicitly extinguish state common law." *Id.* at 282. The Court further stated,

> In the absence of a promulgated safety standard, the Act simply fails to address the need for ABS devices at all. Further, Standard 121 currently has nothing to say concerning ABS devices one way or the other, and NHTSA has not ordered truck manufacturers to refrain from using ABS devices. A finding of liability against petitioners would

> undermine no federal objectives or purposes with respect to ABS devices, since none exist.

*Id.* at 289-90. The situation here is identical to *Myrick*: there is no applicable standard requiring or prohibiting seatbelts in motorcoaches, so Hinton's claim does not conflict with federal law. The Texas Supreme Court applied the proper rules of law and correctly held that Hinton's seatbelt claim is not preempted by FMVSS 208, consistent with *Sprietsma* and *Myrick*.

MCI suggests throughout its petition that the "significant federal objective" implicated by FMVSS 208's silence regarding motorcoach passenger protection is some sort of amorphous and undefined "other types of occupant protection"[5] or "a different safety method."[6] But as discussed above, the regulations belie this contention. MCI advanced this same argument in the Texas Supreme Court, which that court rejected: "Thus, it is inaccurate to suggest that NHTSA chose an alternate method to protect passengers; instead, NHTSA chose not to regulate seating design or seatbelts in motorcoaches, a decision that does not have preemptive force for the reasons explained above." App. 33.

In this regard, MCI has incorrectly described the Texas Supreme Court's holding. On page 15 of their

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[5] MCI's Petition, p. 37.

[6] MCI's Petition, p. 41.

Petition, MCI states the Texas Supreme Court ruled "for a safety regulation to have preemptive force, the agency must 'affirmatively' take the 'further step to disallow state regulation' – i.e., 'indicate[ ] opposition to seatbelts and an affirmative desire to forbid their use.'" But this misstates what the Texas Supreme Court said; the court was discussing whether and to what extent regulatory *inaction* could give rise to preemption. After discussing *Sprietsma*, *Myrick*, and *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), the Texas Supreme Court said,

> From these cases, it follows that an agency's mere decision to leave an area unregulated is not enough to preempt state law. Instead, the agency must, consistent with the authority delegated to it by Congress, affirmatively indicate that no regulation is appropriate. That is, the agency must state that not only will it leave the area unregulated, it will not allow any regulation in that area as a matter of policy. Unless the agency takes this "further step" to disallow state regulation, its decision not to regulate has no preemptive force.

App. 28 (citing *Sprietsma*, 537 U.S. at 67).

MCI cannot identify a single regulation that presents an actual conflict with Hinton's seatbelt claim because there simply is no federal regulation regarding passenger occupant protection in large motorcoaches. MCI mentions one specific "safety method" in its petition that can be potentially misleading – compartmentalization. As mentioned above,

FMVSS 222 addresses "compartmentalization," which refers to the use of engineered seat design in an effort to protect passengers on buses. But FMVSS 222 only applies to school buses – not motorcoaches. *See* FMVSS 222 S3. And MCI admitted at trial that its bus did not comply with the compartmentalization requirements of FMVSS 222 anyway.

The FMVSS standards that govern occupant protection in vehicles simply do not apply to large motorcoach passengers – only the driver. Frankly, the degree to which NHTSA has left motorcoach passenger protection unregulated over the years is remarkable. In light of this lack of regulation, the Texas Supreme Court properly applied the preemption rules set forth by the Court in *Sprietsma* and *Myrick* and correctly determined that Hinton's seatbelt claim is not preempted.

## III. MCI suggests the implied preemption analysis differs depending on the underlying federal statute at issue. But the Court's decisions consistently follow a single preemption framework predicated on the Supremacy Clause rather than a particular statute, and the Texas Supreme Court followed that framework.

The Court granted certiorari in *Geier* in order to resolve a conflict among various state and federal courts about the preemptive effect of the Safety Act. *Geier*, 529 U.S. at 866. Some courts had held that the express preemption clause of the Safety Act preempts

"any safety standard" (including common law claims) that is not identical to the "same aspect of performance" addressed by the particular FMVSS. *Id.* at 865-66. Other courts had held that the Safety Act did not preempt "no air bag" suits like *Geier* at all. *Id.* at 866. The court of appeals in *Geier* rejected both of these approaches and considered the preemptive effect of the Safety Act using traditional conflict preemption analysis, as several other federal circuit courts had previously done. *Id.* at 865-66.

The Court resolved these conflicts in *Geier*, holding that the express preemption clause of the Safety Act does not preempt common law claims, and preemption with respect to regulations under the Safety Act must be analyzed using traditional conflict preemption principles. *Id.* at 866-67.

The Court analyzed how the express preemption clause and the saving clause should be construed in order to give effect to each:

> Without the saving clause, a broad reading of the express pre-emption provision arguably might pre-empt those actions [i.e. common law tort actions], for, as we have just mentioned, it is possible to read the pre-emption provision, standing alone, as applying to standards contained in state legislation or regulations. And if so, it would pre-empt all nonidentical state standards established in tort actions covering the same aspect of performance as an applicable federal standard, even if the federal standard merely

> established a minimum standard. On that broad reading of the pre-emption clause little, if any, potential "liability at common law" would remain. And few, if any, state tort actions would remain for the saving clause to save. We have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions, in such circumstances. Hence, the broad reading cannot be correct. The language of the [express] pre-emption provision permits a narrow reading that excludes common-law actions. Given the presence of the saving clause, we conclude that the [express] pre-emption clause must so be read.

*Id.* at 868. After concluding the express preemption clause does not preempt common law tort claims, the Court discussed whether the saving clause required a different sort of analysis than traditional conflict preemption principles:

> We have just said that the saving clause *at least* removes tort actions from the scope of the express pre-emption clause. Does it do more? In particular, does it foreclose or limit the operation of ordinary pre-emption principles insofar as those principles instruct us to read statutes as pre-empting state laws (including common-law rules) that "actually conflict" with the statute or federal standards promulgated thereunder?
>
> * * *

> We now conclude that the saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles.

*Id.* at 869 (emphasis in original). The dissent argued the saving clause imposed a "special burden" on a party claiming preemption, which the majority rejected. Instead, the majority held, neither the express pre-emption clause nor the saving clause had priority or supremacy over the other:

> Neither do we believe that the preemption provision, the saving provision, or both together, create some kind of "special burden" beyond that inherent in ordinary pre-emption principles – which "special burden" would specially disfavor pre-emption here. The two provisions, read together, reflect a neutral policy, not a specially favorable or unfavorable policy, toward the application of ordinary conflict preemption principles.

*Id.* at 870-71 (internal citation omitted). The Court later followed the same analytical framework in *Sprietsma*, and reiterated it in *Williamson*.

The Texas Supreme Court followed the Court's decisions in *Geier*, *Myrick*, and *Sprietsma*, each of which articulates a consistent approach to implied conflict preemption. Though *Williamson* was decided after the Texas Supreme Court decided this case, the court correctly predicted that "choice" preemption was not as broad as some other courts had held, or as MCI contended. In fact, the Texas Supreme Court has

extensive experience with implied preemption. *See Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994), *cert. denied*, *Vivian Indus. Plastics v. Moore*, 513 U.S. 1057 (1994) (pre-*Sprietsma*, holding plaintiff's claim based on lack of propeller guard not preempted by Federal Boat Safety Act); *Great Dane Trailers, Inc. v. Wells*, 52 S.W.3d 737 (Tex. 2001) (holding FMVSS 108 is minimum standard that does not preempt common law claim); *Bic Pen Corp. v. Carter*, 251 S.W.3d 500 (Tex. 2008) (claim against manufacturer of disposable lighter impliedly preempted by Consumer Product Safety Commission regulations).

Applying the "ordinary conflict preemption principles" set forth by this Court, the Texas Supreme Court correctly held Hinton's seatbelt and glass claims are not preempted by FMVSS 208 or FMVSS 205, so there are no compelling reasons to grant the Petition.

## CONCLUSION

The petition for a writ of certiorari should be denied.

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# In The
# Supreme Court of the United States

MCI SALES AND SERVICE, INC., et al.,

*Petitioners,*

v.

JAMES HINTON, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Texas**

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Respondents do not dispute that MCI's petition offers a good vehicle for resolving important federal issues with broad ramifications: the preemptive effect of two federal motor vehicle safety standards on state common-law design-defect claims against a motorcoach manufacturer. Nor do they dispute that the Texas Supreme Court's decision conflicts with decisions from other courts around the country on these issues, or that uniformity is especially necessary in this context because motorcoaches frequently travel between states. Instead, Respondents argue that MCI's petition should be denied because the Texas court's decision was correct. (Opp. 4, 23, 27) MCI of course strongly disagrees with Respondents on the merits, but, in any event, their merits arguments do not diminish the need for this Court to resolve the conflicts.

Respondents also argue that this Court resolved one of these conflicts in *Williamson v. Mazda Motor of America, Inc.*, 131 S. Ct. 1131 (2011). But *Williamson*, which involved a different regulation and was decided after this case, only clarifies the analysis. It does not resolve the lower courts' disagreement about the objective of the glazing regulation in FMVSS 205. This Court should grant certiorari to resolve the conflict. Alternatively, the Court should, as it did in *Priester v. Ford Motor Co.*, 131 S. Ct. 1570 (2011), grant certiorari, vacate the judgment, and remand to the Texas Supreme Court for further consideration in light of *Williamson*.

## I. The Texas Supreme Court's decision conflicts with those of other lower courts and with prior decisions of this Court.

Rather than dispute or minimize the conflicts that exist among lower courts over the application of conflict preemption to FMVSS 205 and FMVSS 208, Respondents contend that *Williamson* resolved one of the conflicts, and that the decision below is consistent with this Court's previous decisions. But important conflicts remain.

### A. *Williamson* does not resolve the conflict over the preemptive effect of the glazing standard in FMVSS 205.

In *Geier v. American Honda Motor Co.*, this Court held that a common-law tort claim against an automobile manufacturer for not installing airbags stood as an obstacle to accomplishment of the objective behind a portion of FMVSS 208 that "sought a gradually developing mix of alternative passive restraint devices." 529 U.S. 861, 886 (2000). Therefore, the common-law claim was preempted. *Id.*

As Respondents concede, several courts have since "struggled with the extent to which *Geier*'s reasoning applied to FMVSS 205"—a safety standard that gives motor vehicle manufacturers a choice between multiple glazing options in side passenger windows. (Opp. 7) *Williamson*, which involved a different portion of FMVSS 208 than in *Geier* or this case, provides some guidance by clarifying that the

choice must be a "significant objective" of the regulation. 131 S. Ct. at 1134. As one federal district court recently explained, *Williamson* "refined the parameters of obstacle preemption," holding that preemption "turns on an essential threshold showing—that 'a significant objective of a federal regulation' be identified." *Smith v. BAC Home Loans Servicing*, No. 2:10-cv-00354, 2011 U.S. Dist. LEXIS 26104 (S.D. W. Va. Mar. 11, 2011) (alterations omitted).

But *Williamson* does not resolve the conflict over FMVSS 205. Respondents acknowledge as much by noting that "[t]he question is whether the choice afforded by FMVSS 205 is a '*Geier* choice' or a '*Williamson* choice.'" (Opp. 3) The Texas Supreme Court concluded that the choice provided in FMVSS 205 was not a "*Geier*-like policy decision" and, thus, did not preempt Respondents' claims. (Pet. App. 43) But the court's holding was based primarily on its erroneous assumption that all safety standards are "minimum standards" (*id.* at 38–39) and its conclusion that FMVSS 205 "does not state a positive desire to preserve the use of tempered glass." (*Id.* at 43–44) Other courts have disagreed, concluding that FMVSS 205 reflects a deliberate objective, for safety reasons, to provide manufacturers a range of options. *See Morgan v. Ford Motor Co.*, 680 S.E.2d 77, 94–95 (W. Va. 2009); *Lake v. Memphis Landsmen, L.L.C.*, No. W2009-00526-COA-R3-CV, 2010 Tenn. App. LEXIS 200, at *24–26 (Tenn. Ct. App. Mar. 15, 2010).

The conflict in these cases is over NHTSA's objective behind the glazing regulation in FMVSS

205—an issue that *Williamson* does not address. If the latter courts have interpreted NHTSA's objective correctly, then, under *Williamson*, the objective was significant and FMVSS 205 has preemptive force. (Pet. 26–30) The Court should grant certiorari to resolve this continuing conflict.

### B. The Texas Supreme Court's non-preemption holding on the seatbelt standard in FMVSS 208 conflicts with decisions of this Court and lower courts.

Respondents likewise do not dispute that the Texas Supreme Court's holding on FMVSS 208—that the seatbelt standard does not preempt Respondents' claims—conflicts with at least four lower court decisions. (Pet. 19–20) Respondents assert instead that the Texas court's decision is consistent with this Court's holdings in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) and *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995). But those cases predate the conflicting lower court decisions and have not prevented the conflict from developing.

Moreover, *Sprietsma* and *Freightliner* do not apply here because those cases involved true regulatory silence while this case involves a deliberate agency decision. As discussed below, an agency decision that thoroughly considered the issue and chose not to require passenger seatbelts, based on safety reasons, is different from the complete absence of a

regulation. Because the Texas Supreme Court incorrectly applied *Sprietsma* and *Freightliner* to a case not involving regulatory silence, its seatbelt holding is in conflict with prior decisions of this Court.

### C. The Texas Supreme Court's decision conflicts with this Court's implied-preemption decisions.

The Texas court emphasizes—in both its glazing and seatbelt holdings—that there must be some expression of the agency's intent to preempt common-law claims. Requiring an expression of preemptive intent directly conflicts with this Court's implied-preemption analysis, as articulated in *Geier* and *Williamson*. If allowed to stand, the Texas Supreme Court's decision may be used by courts in Texas and elsewhere to further limit or eliminate implied preemption altogether.

In response, Respondents mischaracterize MCI's position as "suggest[ing] the implied preemption analysis differs depending on the underlying federal statute at issue." (Opp. 23) That misunderstands MCI's point. As articulated in *Geier* and *Williamson*, there is a single conflict-preemption framework that applies to all federal statutes. But the language and history of the particular statute or federal regulation can affect how that analysis is applied. This is, in part, because courts must focus on the objective behind the federal regulation.

For example, *Geier* explains that the National Traffic and Motor Vehicle Safety Act has a "neutral policy" towards preemption because it contains an express preemption provision and a saving clause. 529 U.S. at 870. *Sprietsma* explains that there is essentially no implied preemption under the Boat Safety Act—even though it has those same provisions—because of that Act's unique regulatory history, in which the Coast Guard expressed a desire for states to regulate areas not expressly regulated by the Act. 537 U.S. at 65–66. *Wyeth v. Levine* explains that it is significant that the Federal Food, Drug, and Cosmetic Act contains a saving clause but no relevant express preemption provision. 129 S. Ct. 1187, 1200 (2009).

Thus, although the conflict-preemption doctrine is the same, it applies differently depending on the text of a statute and its regulatory history. The Texas Supreme Court did not appreciate this distinction and, instead, applied the presumption against preemption and minimized implied preemption by focusing on the perceived absence of affirmative statements of preemptive intent in the regulation. This Court should grant certiorari to clarify the viability of implied preemption.

## II. The Texas Supreme Court erred in rejecting preemption.

### A. FMVSS 205 preempts the glazing claim.

Unlike the regulation in *Williamson*, the choice provided to manufacturers in FMVSS 205 served a significant safety objective.[1] In *Williamson*, the agency expressed a desire for three-point seatbelts but gave manufacturers the choice between two-point and three-point seatbelts because of cost concerns. 131 S. Ct. at 1138. In contrast, under FMVSS 205, NHTSA recognized that no one type of glazing is always desirable over another. It depends on the type of accident:

> One safety glazing material may be superior for protection against one type of *hazard*, whereas another may be superior against another type. Since *accident conditions* are not standardized, no one type of safety glazing material can be shown to possess the maximum degree of safety under all conditions, against all conceivable hazards.

ANSI/SAE Z26.1–1996 § 2.2 (emphasis added). This section undermines Respondents' position that one type of material is best for passenger cars, another type for sports utility vehicles, and yet another for

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[1] It is important to emphasize that the regulation in *Geier* is only one example of a choice that is a significant objective. It is not the only choice regulation that can have preemptive effect. But under the Texas Supreme Court's decision, *Geier* would be limited to its exact facts, good for that day only. (Pet. 14, 20–21)

motorcoaches.[2] (*See* Opp. 6) NHTSA's view was that the safety difference between the glazing materials depends upon the type of accident, not the type of vehicle.

Properly understood, FMVSS 205 explains that one type of material (tempered glass) may be better for front and side-impact collisions while another (laminated glass) may be better for rollover accidents.[3] If the glazing regulation in FMVSS 205 does not have preemptive effect, a vehicle manufacturer would have a potential Hobson's choice: install laminated glass and be subject to lawsuits involving the most common collisions (front and side impact) or install tempered glass and be subject to lawsuits involving the least common collisions (rollovers).

As the courts note in *Priester*, *Morgan*, and *Lake*, NHTSA chose not to require laminated glass—and instead gave a choice among glazing materials—because of safety concerns about increased neck

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[2] Although Respondents suggest that tempered glass may be the better choice in passenger cars (Opp. 6), plaintiffs in other cases have sued passenger car manufacturers for installing tempered glass in passenger car side windows. *See, e.g., Raley v. Hyundai Motor Co.*, No. CIV-08-0376-HE, 2010 U.S. Dist. LEXIS 3056, at *1–2 (W.D. Okla. Jan. 14, 2010) (1999 Hyundai Sonata); *Tiller v. Ford Motor Co.*, No. 3:03-cv-489-J-32HTS, 2006 U.S. Dist. LEXIS 4196, at *32 (M.D. Fla. 2006) (1995 Lincoln Town Car).

[3] *See* Wilke et al., EJECTION MITIGATION USING ADVANCED GLAZING: FINAL REPORT viii and x (Aug. 21, 2001) (noting that laminated glass "increases the risk of neck injury").

injuries. *Priester v. Cromer*, 697 S.E.2d 567, 570 (S.C. 2010), *vacated and remanded*, 131 S. Ct. 1570 (2011) (noting NHTSA finding of increased safety risk of laminated glass for belted occupants); *Morgan*, 680 S.E.2d at 79 (finding "NHTSA made a public policy decision to not mandate advanced glazing in side windows because of safety concerns"); *Lake*, 2010 Tenn. App. LEXIS 200, at *24–26 (noting choice was both a cost and safety decision). A choice based on safety concerns is a significant regulatory objective and, thus, FMVSS 205 preempts Respondents' glazing claim.

### B. FMVSS 208 preempts the seatbelt claim.

#### 1. FMVSS 208 is not silent with respect to passenger seatbelts on motorcoaches.

Respondents claim that "[t]here is simply no federal regulation that applies to occupant protection in large motorcoaches." (Opp. 11) But FMVSS 208 is not silent with respect to seatbelts on motorcoaches.[4]

FMVSS 208, entitled "Occupant crash protection," applies to all vehicles and contains no exclusions for large buses or passenger seating positions. *See* 49 C.F.R. § 571.208 ("This standard applies to

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[4] Respondents' claim suggests that NHTSA forgot about or decided not to deal with this issue. Nothing could be further from the truth.

passenger cars, multipurpose passenger vehicles, trucks, and buses."). As Respondents point out, NHTSA knew how to exclude large vehicles or passengers from a regulation. (Opp. 10–12) For example, in FMVSS 207 regarding seating systems, NHTSA expressly excluded passenger seating positions from the regulation's scope. 49 C.F.R. § 571.207, S4.2 (stating general performance requirements applicable to all occupant seats "except" four seating positions, including "a passenger seat on a bus other than a school bus"). In contrast, FMVSS 208 requires seatbelts or other occupant protection for drivers and does not require them for passengers. 49 C.F.R. § 571.208, S4.4.2. The decision not to require passenger seatbelts is different from excluding passenger seating positions from the regulation. Unlike in *Sprietsma* and *Freightliner*, there is no regulatory silence in this case.

Respondents point to other regulations that exclude vehicles over 10,000 pounds, such as the motorcoach at issue here. *See* 49 C.F.R. §§ 571.201 ("Occupant protection in interior impact"), 202 ("Head restraints"), 214 ("Side impact protection"), and 216 ("Roof crush resistance"). The fact that these regulations do not apply to vehicles weighing more than 10,000 pounds does not demonstrate a lack of regulation of occupant protection in motorcoaches. If anything, it shows that NHTSA determined that large vehicles, by virtue of their size and weight, do not need the additional structural requirements. The bottom line is that FMVSS 208 applies to large

motorcoaches, as do numerous other Safety Act regulations.[5]

In addition, the 1992 Rice letter is helpful. It shows that NHTSA's chief counsel believed, two years before the bus in question was manufactured, that a regulation existed for passenger seatbelts on motorcoaches. In other words, the letter confirms that FMVSS 208 is *not* silent. The Texas Supreme Court dismissed the significance of this letter, noting instead that the letter did not indicate an affirmative opposition to seatbelts. (Pet. App. 31–32)

### 2. FMVSS 208's regulatory history does not show inaction; it shows a decision not to require passenger seatbelts on motorcoaches.

FMVSS 208's regulatory history, as outlined in MCI's petition, does not show "30 years of regulatory inaction." (*See* Opp. 12) It instead shows that NHTSA decided not to require passenger seatbelts, which is different from leaving "passenger seating completely unregulated." (*See* Opp. 13) This is emphasized by the 1974 NPRM, which states that motorcoaches were safe without seatbelts and that NHTSA would require them in the future "if it found them desirable." 38 Fed. Reg. 4776 (Feb. 22, 1973) (codified at 49 C.F.R. pt. 571).

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[5] *See, e.g.*, 49 C.F.R. §§ 571.101, 102, 103, 104, 105, 106, 108, 111, 113, 116, 120, 121, 124, 125, 126, 204, 205, 217, 302.

In addition, whether NHTSA formally studied the issue again before 2000 does not affect the analysis. The test under *Williamson* is whether there was a significant regulatory objective behind the regulation. The analysis does not hinge on how recently the agency stated that objective.

### 3. NHTSA's decision not to require passenger seatbelts was a significant objective.

The preemptive effect of FMVSS 208 turns on whether NHTSA's decision not to require passenger seatbelts, based on a safety determination, was a significant regulatory objective. Respondents contend that this issue is controlled by *Sprietsma* and *Freightliner*. But those cases do not involve a regulatory decision not to require a safety device; they involve a complete absence of a regulation.

In *Sprietsma*, the Coast Guard rejected a propeller guard proposal—because of a lack of data—and instead decided to allow states to continue to regulate the area. *Sprietsma*, 537 U.S. at 65–66. There was no propeller guard regulation at all. The Coast Guard did not comment about the desirability of propeller guards or require them only for some size propellers. If the Coast Guard had determined that a guard was necessary for some kinds of propellers but not others, because they were already safe, that would be more like this case. Here, NHTSA determined that seatbelts were needed at passenger seating positions in smaller vehicles but were not necessary for safety or desirable

in large vehicles weighing over 10,000 pounds. 38 Fed. Reg. 4776. Not requiring passenger seatbelts in one seating position, based on such a safety determination, is different from a failure to regulate seatbelts altogether.

In *Freightliner*, the plaintiffs alleged that a tractor-trailer was defective because it did not contain an antilock braking system (ABS). 514 U.S. at 282. The defendant claimed that FMVSS 121, the safety standard governing braking distance requirements, preempted the claim. In fact, NHTSA had tried to require ABS systems on all trucks but the Ninth Circuit made NHTSA withdraw the regulation on procedural grounds. That history is the polar opposite of the history here. This Court held that the claims were not impliedly preempted because the standard "simply fails to address the need for ABS devices at all" and "currently has nothing to say concerning ABS devices one way or the other." *Id.* at 289. In contrast, FMVSS 208 does have something to say concerning seatbelts and does not exclude large buses or passenger seating positions. It regulates seatbelts on motorcoaches, requiring them at the driver seat but not at passenger seating positions.

In sum, NHTSA made a safety determination that passenger seatbelts on large motorcoaches were not necessary and, thus, did not require them. In addition, this case involves the interstate and intercity nature of motorcoaches, which uniquely impacts "Congress's goal of establishing uniform standards on which the motor vehicle industry can rely." *Surles v. Greyhound Lines, Inc.*, No. 4:01-cv-00107,

2005 U.S. Dist. LEXIS 45765, at *17–18 (E.D. Tenn. 2005). Because NHTSA's decision regarding passenger seatbelts on large buses is supported by significant federal regulatory objectives of safety and uniformity, it preempts Respondents' state law claim.

## PRAYER

The petition for a writ of certiorari should be granted.

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